FUNDAMENTALS OF IJTEHAD

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Preface

The door of Ijtehad is open or not? Is it needed or not? Do the people possess the requisite knowledge to undertake the task of interpretation? These and all other debates of a like nature are the product of the apathy of the scholars about interpretative effort. Unfortunately, that level of intellect and wisdom has not been achieved which promotes and develops interpretative effort and enquiry in the field of law.

My opinion may not be infalliable but my experience spread over a considerable period has convinced me that all discussions and debates about interpretation of the Qur-ān and the Sunnah are not motivated by an appreciation of the need of interpretation today. The things are no better even in case of scholarly meetings and intellectual's seminars as they are also not motivated by a sincere desire to find out solutions for the many problems and issues faced by the Muslims. On the contrary these exercises are undertaken to keep the leadership intact and to keep the scholarly flavour alive. In short, it is all done by way of amusement for personal angrdisement where objectivity and true scholarship are always a victim of vain discourses.

To write a book on such a difficult and significant topic as Ijtehad, could at best be an apology for the Divine duties!!! Or it can be an expression of a distant hope that at some stage the slumbering guardians of the Shariat might wake up and take up their obligations in right earnest to save the floundering boat of the Muslims so that it may reach the shore beyond the treaeherous seas, safe and sound and at such time this humble book may prove to be of some use to them.

The book titled "Masalai Ijtehad Par Tehqiqi Nazer" by the Author was published in June 1962 by Idarai Ilm-w-Irfan, Ajmer. This book contained the necessary information about the art of Ijtehad and also indicated the areas of Muslim law where the need of Ijtehad was maximum. It was further pointed out

that in the contemporary conditions Ijtehad was imperative and that reconstruction of Islamic laws at the operational level was not feasiable without interpretative effort.

The present book titled "Fundamentals of Ijtehad" is English translation of "Ijtehad Ka Tarikhy Pas Manzar" with required modifications and contains more material about the rules of Ijtehad. It is in fact an attempt to clearly state and explain the fundamental principles of Ijtehad highlighting the role played in the field by the Companions-Obedients, Leaders of the Interpreters and the Apostle of Allah. The whole discussion is designed to provide a complete picture of the rules and the intricacies of the art of Ijtehad. All the material is arranged in a systematic way to avoid the evil of confusion and generalisations which is the bane of the books dealing with the subject of Ijtehad.

Regarding the English translation of five of my books— *Ijtehad ka Tarikhy Pas Manzar*, *Ahkame Shar'iya men Halato-Zamaane ki Ri'aayat*, *Tehzib ki Tashkil-e-Jadid*, *Hadith Ka Derayati Me'yar*, *La Mazhabi Daur Ka Tarikhi Pas Manzar*— I am deeply grateful to Mr Syed Hamid, Ex-Vice-Chancellor, Aligarh Muslim University, who has granted financial aid for this purpose.

Whatever success has been achieved in this endeavour by the author is entirely due to the Grace and Mercy of Allah and whatever shortcomings remain have been due to this poor soul. I hope and pray that people may be benefited by this humble effort of the Author. Amin !

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Chapter 1

Interpretation: Nature and Scope

The term IJTEHAD literally means, an extreme struggle in the search of truth about some matter, human or otherwise. In Arabic this term is used to signify struggle which involves extreme hard labour. Thus, interpretation is the process of finding out the legal doctrines and rules of Islamic law by employing intellectual effort. Eminent interpreters have defined it in various ways but the whole content of these various definitions boils down to the following:

> An extreme intellectual effort employed by expert interpreters to have a correct and definite perception of the original basic maxims of Islamic law with a view to derive operative orders therefrom to provide the necessary legal solution of the problems and issues faced by an Islamic society at any stage of its development. The whole purpose of interpretative efforts is to provide that quality and quantity of legal rules which a society needs to meet an unending stream of new controversies, conflicts and disputations arising out of the eternal problem of conflicting interests, human and material.[1]

In the field of Islamic law the need of interpretative effort arises:

(i) When no operative order[2] is found in the Qur-ān and Hadith covering the problem and the legal issues involved therein; and

(ii) Nor an operative order covering the controversial legal issue is found in the pre-existing derivative operative

orders i.e., judicial decisions and the edicts (Phatawai) of a Muphty (edict-writer).

The absence of such a relevant operative order which could meet the real life problems necessitates the employment of interpretative effort according to the well established methods of interpretation to settle the legal issues which arise out of such problems.

Where a relevant original operative order or a derivative operative order exists and only the context of circumstances in which it may apply are to be decided then it is comparatively an easier task to resolve the current legal issue. In such a case no new operative order is actually designed because only a pre-existing one is applied to the current legal controversy. This intellectual effort expanded to find out a suitable legal principle for resolving the problem faced is technically called IJTEHAD-E-NAQIS (interpretative effort of an average nature).[3]

However, where a legal controversy of a typical nature is faced where no relevant original or derivative operative order pre-exists then a strenuous interpretative effort becomes necessary, because then the present operative order is to be inferred from foundational legal principles found in the Holy Qur-ān and Hadith. Naturally, only an expert interpreter can perform this complex job employing intensive intellectual effort for this purpose. This is technically called IJTEHAD-E-TAM.[4]

In both kinds of interpretative effort, it is necessary that the person concerned must be an expert interpreter, otherwise such an interpretation will not be technically valid. Every scholar or Muphty (one who issues edicts) cannot be presumed to have that wisdom, knowledge and skill, which an expert interpreter (Phaqih-Sahib-e-Phun)[5] possesses. An expert interpreter is that scholar who analyses the legal precepts and investigates the realities implicit therein and explains the difficult points involved.[6] It is absolutely essential for an expert interpreter to have proper comprehension of the affairs of men and a true perception of the policy of the commandments.[7] The correct appreciation of the policy of the Shariah (Divine Injunctions) and the

expediency necessary for the welfare of the people are the two imperatives which must be paid due attention whenever and by whomsoever intellectual effort of an interpretative nature is undertaken by a Believer who understands. Thus, a Jurist who possesses the technical skill required for interpretation could only be designated as an expert interpreter and no other scholar, wise man or edict-writer can usurp this function according to the principles of Islamic Jurisprudence.[8]

Interpretation is not only permitted but required by the true nature of Islamic instruction. Believers are enjoined not only by express instruction to undertake the function of an interpreter and law giver but impliedly also. The scheme of the Qur-ān shows that, instructions principally of three kinds are found therein. First and foremost, some foundational principles of a universal nature are laid down. Secondly, some particular affairs are covered by structural principles while no detailed rules are given. Thirdly, in a few cases, both the basic principles and detailed operative rules are laid down. Finally, only a few objectives are explicitly given and no rules of a detailed nature are provided.

> And whencesoever thou comest forth (for prayer, O Muhammad) turn thy face towards the Inviolable Place of Worship. Lo! it is the Truth from thy Lord. Allah is not unaware of what ye do. (2:149)

In this verse the believers are directed to turn towards the Sacred Mosque when it is not visible. The effective cause of this instruction is *probability* and *calculation*. When probability and approximation is definitely reliable in case of prayers then it is beyond doubt that, it would be unquestionably reliable in case of injunctions relating to human affairs.

> So learn a lesson, O ye who have eyes! (59:2)

In Islamic Jurisprudence, it technically means turning something to its precedent, meaning thereby that, a rule which applied to its precedent (Nazir) shall apply to the matter under consideration.

> With clear proofs and writings; and We have revealed unto thee the Remembrance that thou mayst explain to mankind that which hath been revealed for them, and that haply they may reflect. (16:44)

This verse invites all those who have the ability to think and reflect to ponder over the Message. But, interpretation will be reliable only of those who engage themselves in inquiry and investigation having deep knowledge and insight in legal matters supported by technical expertise in determining the meaning, import and applicability of a particular injunction. It is quite evident from the following verses:

> Thus do We display Our revelations that they may say (unto thee, Muhammad): "Thou hast studied," and that We may make (it) clear for people who have knowledge. (6:105)

> And the believers should not go out to fight of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return to them, so that they may be ware. (9:122)

Additional proof that the interpreters must have an ability to understand *worldly affairs* and to appreciate the demands of *public policy* is found in the verse given below:

> And David and Solomon, when they gave judgment concerning the field, when people's sheep had strayed and browsed therein by night; and We are witnesses to their judgment. (21:78)

> And We made Solomon to understand (the case); and unto each of them We gave judgment and knowledge. And We subdued the hills and the birds to hymn (His) praise along with David. We were the doers (thereof). (21:79)

So far as knowledge and judgment is concerned both David and Solomon were equal. But in understanding an affair and appreciating the demands of public policy Solomon excelled. For

this reason, his special perception finds a mention in this verse. Once a suit was filed in the court of David that during the night time a number of sheep of one person damaged the crops of another. David on the basis of comparative estimate of loss of crop and the price of sheep decided that, the sheep be handed over to the owner of the field. When Solomon heard this judgment, he said, that in my view sheep be handed over to the owner of the field, so that he may derive benefit from them like milk and wool, while the field be placed in the custody of the shepherd till he brings it to its pre-condition by expanding labour, irrigation and proper care. Thereafter to each of them his property be returned. This judgment was beneficial to both parties and also provided for the reimbursement of the loss. David liked it and withdrew his own judgment.[9] Solomon's merit was that he distinguished between *corpus* and *usufruct* of property and was bold enough to proclaim the truth by putting his point of view before his own father.

As a proof that interpretation could be validly used in the field of Islamic law the following narratives are quoted:

The Apostle of Allah, when he was sending Hazrat Mu'āz as Administrator of Yemen asked him, when you will be called upon to decide a suit, then what will you do ? Mu'āẓ replied that whatever is in the Book of Allah, I will judge according to it. The Apostle observed, if it is not in the Book of Allah ? Mu'āz said: I will judge according to the Traditions of the Apostle of Allah. The Apostle observed, if it is not in the Traditions ? Mu'āẓ replied: I will interpret according to my own point of view and you will not find me wanting. On hearing this, Apostle of Allah was pleased, and as a gesture of his pleasure patted his chest and observed, thank God who gave to the messenger of the Apostle of Allah divine guidance (God's graciousness) which is pleasing to the Apostle of Allah.[10]

Some persons have criticised this Tradition as *an authority* and Ibn Qayyem and Ibn 'Arbi and others have repudiated this criticism. Even if it is assumed that it is a *weak* tradition by the *rule of narration*, its weakness evaporates when evaluated

by the standard of *intrinsic merit*. The aforementioned verses and other traditions support this assertion:[11]

> Whenever an officer decides by means of interpretation an issue presented to him correctly, then he gets, twice the reward, while when he decides incorrectly, even then he gets a reward.[12]

This difference is probably due to the difference in the nature of intellectual effort employed in the two cases.

Interpretation is the most important source of law beside the Book and Traditions. It is the only method of providing that quality and quantity of legislation which the growing problems of life in a developing society demand. It is an important chapter of divine instruction and in fact for this reason Apostle of Allah to complete the scheme of instruction took recourse to it and set an example for others. By resorting to interpretation on innumerable occations he imparted adequate knowledge about the intricacies of this delicate task. After his life time, his methods of interpretation provided a model of conduct to those who had to perform this job in his absence. But because the Prophet (peace be upon him) had the privilege of receiving 'Divine Revelation' there was no possibility of an error by way of commission or omission. Hence his precepts fall within the sphere of this verse:

> That which Allah giveth as spoils unto His messenger from the people of the townships, it is for Allah and His messenger (i.e., for the state) and for the near of kin and the orphans and the needy and the way-farer, that it becomes not a commodity between the rich among you. And whatsoever the messenger giveth you, take it. And whatsoever he forbiddeth, abstain (from it). And keep your duty to Allah. Lo! Allah is stern in reprisal. (59:7)

To understand the true nature and quality of his precepts we may usefully appreciate the functions of a physician. A

doctor has to know and understand everything pertaining to the intensity of the ailment, its characteristics, the age of the patient, his place of residence, the season and the like. He thereafter prescribes the treatment including instructions about food etc. On the basis of these factors, he discloses many things which others do not know. In other words, he perceives those intricacies which are beyond the comprehension of those who are not so qualified. Sometimes, he equates patent conditions with the latent conditions, e.g., he interprets redness of face or bleeding gums as an indication that blood pressure was the real culprit. Sometimes he considers latent conditions as the cause of external manifestations, e.g., a person who fails to consume a particular drug in specified doses shall die.

Sometimes in view of the condition of the patient or the kind of the disease he prepares new drugs and compounds and proves them as most effective for particular ailments.

Obviously, for these functions a knowledge of medical science alone is not enough. Professional expertise is imperative to draw proper inferences from the condition of the patient and the characteristics of the disease.

The management of the spiritual and human life is much more delicate then the physical well being of a person. It more readily accepts suggestions and impressions. Necessarily, professional skill and expertise is, by itself, not enough to understand the intricacies of treatment involved in this case. Inevitably this task demands *divine inspiration*.

This divine inspiration is the exclusive domain of the sagacity of Prophethood (Sha'ur-e-Nabuwat). Sagacity of the Prophethood denotes that perfection of understanding and perception which arises from inspired intuition. This *sagacity* is considered the most unadulterated source of wisdom and perception. This virtue arises from divine inspiration received directly from Allah the Most Wise. Necessarily, inferences drawn by the use of this sagacity are always definitely reliable. Such reliability and value cannot be attached to the interpretative effort of others. Moreover, the process of correction and

addition continued during the lifetime of the Prophet. This privilege is/was obviously not available to others and hence their interpretative exertions do not possess the quality of definite reliability. Hazrat 'Umar observed:

> O People, the view point of Apostle of Allah used to be straight to the point and absolutely correct because Allah guided his goodself. Ours is mere probability and ceremony.[13]

Once Khawl" Bint Tha'labah asked the Apostle of Allah the rule applicable in case of 'Zihar'? Who observed that, "according to my opinion you are now forbidden to your husband."[14]

This opinion of the Apostle was correct according to the prevailing 'Arab custom. According to customary law, a wife was permanently prohibited in case the husband pronounced words constituting Zihar. Accordingly, verses dealing with this aspect of sex relationship were revealed. It was provided that, if a person equates his wife with his mother, then she will not be permanently forbidden for him. Instead the prohibition shall continue only till the husband makes amends. The expiation prescribed was to free a slave; if that was not possible to fast for two months consecutively; if that was also not possible, to feed sixty indigent. Generally, 'Zihar' was expressed by pronouncing words, that *'thou art to me like the back of my mother.'*

This Pagan custom implied a divorce, whereby the husband was freed from all responsibility for conjugal duties but did not leave the wife free to leave his home or marry another person. This was a degrading and inequitable custom. It was particularly painful and disastrous in case of *Khawl"* because she loved her husband and had no resources to support herself and her children, whom under 'Zihar' her husband was not bound to support. Allah heard her cry and this custom was abolished.

The following verses may be noted:

If any men among you
Divorce their wives by Zihar (calling them mothers),
They cannot be their mothers:
None can be their mothers
Except those who gave them
Birth. And in fact
They use words (both) inequitous
And false: but truly
God is one that blots out
(Sins) and forgives (Again and again). (58:2)

But those who divorce
Their wives by Zihar,
Then wish to go back
On the words they uttered,
(It is ordained that such a one)
Should free a slave
Before they touch each other;
This are ye admonished
To perform: and God is
Well-acquainted with (all)
What ye do. (58:3)

And if any has not
(The wherewithal)
He should fast for
Two months consecutively
Before they touch each other
But if any is unable
To do so, he should feed
Sixty indigent ones
This, that ye may show
Your faith in God
And His Apostle.
Those are limits (set
By) God. For those who
Reject (Him), there is
A grievous penalty. (58:4)

Some of the Ancients (Mutaqaddimīn) have engaged in a futile discussion about such questions as: What was the necessity of

interpretation during the period of Revelation? Apostle of Allah was or was not authorised to interpretate? If so, then His Goodself interpretated in his personal capacity or in the capacity of an Apostle? The author entirely agrees and accepts the view-point of Imam Sarkhsi who maintains that:

> In our estimation the most correct view is that the Apostle of Allah whenever faced a controversial issue and no *Revelation* was received about it, then he waited for *Revelation*, after the expiry of the period of waiting he revealed the governing principle on the basis of opinion and interpretation. If no countermanding *Revelation* was received, it was taken as a sign to retain the rule, so expressed, or was taken to be approved tacitly by Allah, the Wise, the Merciful.[15]

It is almost next to impossible to draw a line between his dual capacity of a prophet and of an interpreter. Assuming, that such a divider could be established, the result will not be different. Practically, the validity of the principle arrived at in either capacity will be the same. Thus, to engage in such argumentation is nothing but a waste of time and energy.[16]

Interpretation by persons other than Apostle of Allah was derived from interpretative perception of their own and may be defined as:

> that *expertise* by which rules are deduced from the roots and applied to branches or the new situations. [16a]

This interpretative perception is produced by the sagacity of 'the self' (mind) and of the 'inner-self' (heart). As both possess powers of discrimination and judgment. It is factually wrong that we have only one voice which helps us in making decisions. The reality is, that, there are two such voices which, for want of a better expression, may be expressed by the terms 'self' and the 'inner-self'. Besides these two, Allah has endowed all of us with a sense of 'innate goodness'.

This sagacity of perception is found in varying degrees amongst us and may be explained as follows:

Intelligence

Sensory Perception: (*Intellect or Phirāsat*) A person arrives at certain conclusions by observing outward signs;

Intuition: (*Kashph*) A person according to his spiritual status commands the capacity to know human affairs and other realities of life without recourse to sense perception.

Divine Inspiration: (*Ilhām*) A person acquires knowledge of the unknown through divine inspiration.

Further for the utilisation of interpretative expertise both 'mental insight of the self' and the wisdom of 'inner-self' ought to be employed. This is indicated by the Qur-ān:

> Many are the Jinns and men
> We have made for Hell:
> They have hearts wherewith
> They see not, and ears wherewith
> They hear not. They are
> Like cattle,—nay more
> Misguided: for they
> Are heedless (of warning). (7:179)

The Message uses the word 'Tuphqa" ' to express the perception of the 'inner-self' in preference to the term 'Ta'qul'. It clearly establishes that, the 'inner-self' possesses a special inbuilt ability for the resolution of intricate interpretative questions.

In fact 'Interpretative Perception' is a substitute for sagacity of Prophethood. The latter was stopped at a time when interpretative sagacity had reached a state of adequately replacing it effectively. That is to say, when it acquired such maturity, vitality (versatility) and fairness of that degree that, to solve the problems of the society both individual and collective, it was no more imperative to wait for Divine Guidance everytime a problem arose. (As was the case during the lifetime of Apostle of

Allah). Instead, man started solving the problems through the medium of thought, reflection, inquiry and research. But sociologists, humanists and thinkers are well aware of the reality that judgment and conclusions based on the perception of 'self' and 'inner-self' are not absolutely free from frailties of human reason. On the contrary, sense perceptions, logical deductions and value judgments are all so intermixed in both of them that it is almost impossible to separate them entirely.[16b]

In such a situation the judgments and conclusions arrived at by the application of interpretative perception will not be definitely reliable. Therefore, no free rein can be given to such inferences and conclusions for providing solutions (rules) for resolving the problems of the mankind. Instead, this human interpretative sagacity to deal with the turns and twists of the interpretative effort must seek wisdom and insight from a higher and better guide so that under such guidance its character and quality may improve to the maximum.

This *guide* is the sagacity of prophethood. In this world of mortals there is no evidence showing that anything else could be more reliable, pure or unadulterated. No doubt the process of deriving direct guidance from this inspired *sagacity* is no more available but the knowledge and perception derived therefrom of two kinds is still available and secure:

1. That knowledge and perception which the sagacity of the Prophethood directly derived from Divine Inspiration which falls within the perview of extra-sensory perception and is technically known as Grand Qur-ān; and

2. That knowledge and perception which is the result of intuition and sagacity of Prophethood and had been derived directly from the Grand Qur-ān through inference and deduction and is technically known as 'Hadith' (Tradition).

In Islamic legal system only these two are the true and valid *guides* for human interpretation. Such interpretations by following these two guides acquire the status of a *source of law*. Interpretation assumes that exalted position which was

exclusively reserved for the sagacity of the Prophet. Thus, its infirmities are cured by the light of the two aforesaid guides to discharge its heavy obligations properly.

Grand Qur-ān is sure guidance and is the real fountain head of the totality of rules of action covering all human affairs. It explains the objects of laws, public policy, constitutional principles and precepts which constitute the foundation of Islamic law and interpretation. It contains few detailed legal rules applicable specifically to certain areas of human conduct but whatever it consists is revealed as a *model* for the purpose of elucidation and clarification of the foundational principles. So that, the process of inference and deduction may continue to meet the diverse needs of an evergrowing life in a developing society at any one time till posterity.

This structure of instruction was imperative for a Book containing eternal universal guidance. Because, if detailed rules had been laid down for the different aspects of life (spiritual, biological and materialistic) then the Message would not have been capable of providing an everlasting source of law. The vitality and comprehensiveness which is implicit therein is of such nature that all future problems of the society could be solved by deriving operational rules therefrom through inference and logical deduction.[17] In short, it enables us to supply appropriate relevant rules of conduct for dealing with an infinite variety of legal issues which inevitably arise in a developing society with the passage of time. The Grand Qur-ān, though brief, is comprehensive and consists of principles basic or foundational for the regulation and establishment of a well-ordered society. Where detailed rules are laid down they are based on some general principles.[17] The basic principles have been fully explained by means of examples, similitudes, parables and narratives.

The Traditions which consist of the practices and the precepts of the Prophet actually clarify and elucidate the basic principles found in the Message. In fact they have been derived by implication from the *text*. Because of this characteristic they constitute the second source of Islamic law, the first being the Grand Qur-ān. Later interpretative efforts have

been inspired and guided by them. The exclusive quality of the Prophethood is the complete perception of the *truth*. Hence, the interpretative sagacity of the Prophet was often of an extra-ordinary nature. Because of this reason he provided guidance about those spheres of life which would have certainly remained outside the reach of the later intrepreters.

Thus, it is imperative to derive guidance from this source material to understand the finer points and subtleties of the art of interpretation. Unless, such guidance is sought, recognised and applied through interpretation, the latter cannot be substituted for the sagacity of Prophethood. In such a case, interpretation as a source of law will be nothing more than *free opinion* which has no place in the scheme of Islamic Legal System.

Some examples of the elucidation and clarification of some verses of the Qur-ān given by the Prophet may be noted. These examples of inference and deduction are mentioned so as to show the manner in which the interpretative ability must be utilised for laying down operational rules:

O ye who believe!
Eat not up your property
Among yourselves in vanities
But let there be amongst you
Traffic and trade
By mutual good will:
Nor kill (or destroy)
Yourselves: for verily
God hath been to you
Most Merciful! (4:29)

This verse explains two rules, one positive and the other negative. Unjust profit making is prohibited but just profit making through trade and business is permitted. The Prophet, in the light of these two principles, evaluated and examined all the then prevailing commercial customs and practices. He declared unlawful those which involved deceit or fraud or where a possibility of unjust profit making existed by way of implication. Thus, many practices and usages relating to buying

and selling among the inhabitants of Arabia were either expressly permitted or forbidden by the application of the said principles:

1. Among the *arabs* it was customary that where the buyer before an examination of goods or before the completion of the transaction, touched the article or the seller threw it towards the buyer or where the buyers placed a small stone over it, then, in all such cases the sale was treated as complete. In case of these transactions mutual consent existed and ordinarily the positive rule ought to have been applicable. But in the light of the implication of the verse it was laid down that even where mutual acceptance was present but there existed a possibility of fraud or deceit and thus unjust profit making was not ruled out, then all such transactions fell within the ambit of the negative rule and hence were impermissible.

2. The Apostle of Allah demonstrated the manner in which the principles of law could be applied to the new situations by way of interpretation. In short, he pointed out the method of inferring or deriving operational rules from the basic principles and to apply the same to identical situations. For example, in case of the verse mentioned above, the basic principle is that unjust profit-making was prohibited and the prevalent customs and practices constitute the details. This effective cause i.e. unjust profit-making whenever found in any type of transaction will render it unlawful. Such prohibition will be applicable irrespective of the fact whether the effective cause is found in the beginning or at the end of the transaction where fraud or deceit is express or implied.

3. He provided the necessary details and the situations when they may be applicable with regard to certain rules found in the Guidance Sure. For instance: Rules relating to shortening of 'prayers' and ablution with clean sand or dust. He also explained the conditions for the application of these rules.

4. He also explained clearly the legal conditions, inhibitions and limitations relating to various matters which rendered the observance thereof easy and reasonable. In the absence of

such explanations it would have been very difficult to follow them in practice. For example, marriage, divorce and transfer of property.

5. He also laid down operational rules which are not directly and expressly found in the Book but could be legitimately derived therefrom by a careful study of the implications of the language used, e.g., in the presence of father's sister, marriage with brother's daughters, and in the presence of mother's sister, marriage with sister's daughter was prohibited.

6. He explained in detail the implication of absolute verses and qualified their application by indicating the situations and occasions when they may not apply. Thus, he determined rules relating to the then prevailing customs, practices and usages. He explained relevant rules applicable to various human affairs in the light of what is forbidden, recommended, approved, disapproved and required. He clarified, explained, and qualified verses relating to criminal offences and punishment with reference to their context. He, thus, ensured proper enforcement of the divine commandments.

7. He elucidated certain *brief verses* where it would have been difficult to understand their implications and import for the purposes of enforcement in the absence of such clarification. For example, he explained the implications and practical application of verses related to prayer and welfare tax (Zakāt).

8. With the help of, and in the light of basic principles and detailed rules, he evolved new operational rules and also demonstrated the application thereof to actual situations. For example, "Islam stipulates: *neither cause loss nor suffer loss*. Loss shall be removed. Hard labour brings convenience."[18]

9. He highlighted the reasons, objects and purposes of the various Qur-ānic precepts which helped the evolution of subsidiary principles and rules which in turn resulted in the effective expansion of the medium of interpretation. He further highlighted the considerations of policy and wisdom implicit in such precepts.

10. He also explained the background or circumstances in which particular verses were revealed. This provided the material for the proper derivation of rules therefrom by means of analogy and deduction. These illustrations emphasise the need to take recourse to elucidations, clarifications, deductions and principles, found in the practice and precepts of the Prophet and must be utilised and relied upon in attempting interpretation to tackle successfully the legal issues which arise in the contemporary society. This is imperative to extend the operational area of interpretation so that Islamic principles retain that vitality and vigour which is so necessary for their use in meeting the challenges of our own era. These elucidations, clarifications, inferences, and deductions provide us with three distinct methods of interpretation:

(i) Interpretationem expositoris or Expository Interpretation

(ii) Interpretationem deducere or Deductive Interpretation

(iii) Interpretationem polititia or Expediential Interpretation.

i) *Expository Interpretation:* denotes a process where by means of elucidation, clarification, the meaning, and import of the relevant verses or traditions are considered and used so as to evolve operational rules. In this case phraseology, meaning, reference and context all are considered to derive a legal principle applicable to a particular situation or circumstance.

ii) *Deductive Interpretation:* denotes the method where the effective cause of a legal principle is discovered by extreme intellectual effort for evolving a legal rule which shall apply to similar situations. In short, the legal issue under consideration is settled by means of the effective cause found in earlier legal principles applied to a similar situation.

iii) *Expediential Interpretation:* denotes a situation where by undertaking the inter-working of the spirit of law and demands of public policy, an operational rule is derived for effectively dealing with the situations under consideration.

The rapid development of Islamic law and the notable role played therein by the medium of interpretation, all owe their existence to the model interpretations resulting from the sagacity of prophethood. For this purpose it is necessary to have a proper insight in matters of practices and precepts of the Prophet and a superfluous knowledge thereof will be counter productive.

Hazrat Shah Wali-ullah in his own style observes:

> Tradition is actually the kernel and the stone is really inside, it is the shell and pearl is the centre.[19]

Explaining further the similitudes of stone and pearl he states:

> (It is the) comprehension of the legal meaning and import of a Tradition; (it is) laying down the operative rules derived through deductions; (it is) reasoning by analogy and an understanding of the implications of the Text. It all denotes the art of interpretation. (Further) (it is) preception of repealed, unrepealed, weak and strong legal arguments which is involved in this art of interpretation. Category wise they may be compared in degree and grade with 'stone' and 'pearl'.[19]

Interpretation being the source of law and a substitute for the interpretations of the Prophet cannot be successfully practised unless one is a scholar, philosopher and a Doctor of Law, possessing perfect perception and professional expertise.

NOTES AND REFERENCES

1. Abu Ishaq Shatibi : Al-Muwafiqāt, Chapter Kitāb-ul-Ijtehad and others.
2. Original Operative Order; Past Derivative Operative Order; Present Derivative Operative Order. The first denote those legal rules which are found in the Qur-ān and Hadith. The second signify Derivative Operative Orders which pre-existed the problem under consideration. The last category consists of Derivative Operative Orders discovered and applied to the current controversial legal issues or problems.

3. See Ibn-i-Badran al-Dimashqi : *Al-Madkhal-ila Mazhabil Imām Ahmad b. Hanbal.*
4. *Ibid.* 3.
5. Ibn-i-Amir Al-Hajj : *Al-Taqrir wal Tahbir*, Vol. *3, Al-Maqalatus Salisch fil Ijtehad.*
6. Jarullah Zamakhshari: *Kitab-ul Faiq.*
7. *Ihya-ul-Uloom*, Vol. I, *Al-Lafzul-Awwal al-Fiqh.*
8. Abu Bakr, Muhammad Bin Ahmad Al-Sarakhsi, *Usool-us-Sarakhsi*, Vol. II, Chapter : Qiyas.
9. Ibn-i-Arabi, *Ahkam-ul-Qur'ān.*
10. Abu Daud, *Kitab-ul-Aqziya*, Chapter: Ijtehaur-Raifil-Qaza'.
11. Ibn-i- Qayyim, *Alam-ul-Muwaqqi* in, Vol. I; Abu Bakr Ibn-i-Arbi, *Ahkam-ul-Qur'an* Vol. I.
12. Bukhari, *Kitab-ul-Itisam*, Vol. II; *Muslim*, Vol. II, *Kitab-ul-Aqziyah.*
13. Abu Daud, *Kitab-ul-Aqziyah*, Chapter : fi Qazail Qazi : Iza-Akhtaa.
14. Qazi Sanaullah Panipati, *Tafsir Mazhari.*
15. Al-Sarakhsi, *Usool-al-Sarakhsi*, Vol. II, Chapter : Tariqati-Rasulillah fi-Izhar-ul-Shara.
16. For a detailed discussion please see author's books titled *Lamazhabi Daur ka Tarikhi Pas Manzar*, and *Tahzib ki Tashkil-i-Jadid.*

16(a). 'Asal' and 'Phuru'.

6(b). See : '*Lamazhabi Daur ka Tarikhi Pas Manzar*, and '*Tahzib ki Tashkil-i-Jadid*'. by Maulana Muhammad Taqi Amini, published by Nadwatul Musannifin, Delhi (Urdu Language).

17. Shatibi, *Al-Mawafiqat.*
11. *Al-Ashbah-wal-Nazair-fil-Qwaidil Kullliyah.*
19. Waliullah, *Hujjatillahil Balighah*, Muqaddimah p. 2.

Chapter 2

General Development of Interpretation

The First Phase: The Companions

During the life time of the Prophet legal affairs were exclusively within the domain of his functions. Interpretation also was initially one of his responsibilities. He carried out the functions of a law giver during his life time in the most successful manner. Fortunately when he left for his heavenly abode, the 'Faith' (DĪN) was complete and the art of interpretation was well developed. A group of companions had acquired adequate knowledge and expertise in the art of interpretation and thus could provide the necessary rules and regulations for the establishment of a well ordered society. Interpretation as such assumed the role of the law giver to meet both the qualitative as well as quantitative needs of a developing society. These companions were well versed in the art of interpretation and had an insight into the finer points and complexities involved in it. They not only evolved the legal principles but also undertook formal compilation of the then existing Operative Orders. Thus they laid down the foundation for the systematic development of Operative Orders for controlling and directing human actions in the society of Islam. They performed this job creditably as they were highly motivated and capable leaders of religion and law.

In the same manner as the intelligent students of medical science benefit by their training under the expert eye of an able physician and acquire an insight into the characteristics and effects of various drugs and eatables, those companions who were intelligent and keen having a special aptitude for the art of interpretation benefitted from the instructions and companionship of the Prophet and also acquired exper-

tise in matters of enforcement of legal precepts. These persons possessed the capacity to understand basic principles of law and the policy considerations on which they were founded. They also determined the reference and context of various legal principles so as to evolve new operational rules for the regulation of social, economic and political affairs of the society. As they have learned their lessons directly from the Prophet they legitimately had the right to take recourse to interpretation in the absence of the Prophet. They acquainted well in this onerous task and through interpretative efforts provided the necessary instructions for the regulation and control of human actions. This era of gradual development of interpretation as a source of Islamic Law can be conveniently divided into three phases:

I) The Companions [ṢAHĀBA"]

II) The Obedients [TĀBI'ĪN]

II) Leaders of Interpreters [AIMAH-MUJTEHIDĪN]

During this period conquest of new lands and civilizations multiplied rapidly and the Companions had to face a large number of social, economic and political problems involving important legal issues. A resolution of these problems was imperative for ensuring smooth development of a well-ordered society. Though they were entitled in their own right to use their interpretative effort but they always acted in the most cautious manner.

Hazrat Abu Bakr's way of working is narrated as follows:

> Whenever he was called upon to decide a matter which required adjudication according to law, then firstly, he consulted the Book and whenever he discovered a relevant rule therein, he decided accordingly. When he failed to discover the same in the Book he consulted the Traditions and precepts of the Prophet where his search was successful he decided on its basis. Whenever he could not find a rule therein personally then he questioned the people,

"do you know how the Prophet decided such a case."[1]

When he failed in all his endeavours in this regard then he used to consult the leaders of the scholars in a meeting. When these erudite scholars unanimously expressed an opinion then he used to adjudicate in consonance with such an opinion.

The same process was adopted by Hazrat 'Umar. The only difference was that in matters requiring adjudication he consulted the Book, the Traditions and the judicial precedents found in the judgments of Hazrat Abu Bakr. Whenever he found no express rule covering the situation under consideration in the said three sources of the law, then he used to take recourse to consultation and interpretation.[2]

A similar procedure for adjudication of disputes was adopted by Hazrat Abdullah Bin Mas'ud, Abdullah Bin Abbas and other companions. All of them first consulted the Book then the Traditions and thereafter the judgments of their predecessors. Whenever they found no express rule therein then they utilized their own interpretative effort to lay down an operative rule relating to the controversy under consideration.

Present day methods of interpretation were laid down much later. The companions were well aware of the objectives and the spirit of Islamic law and meticulously followed the same in their interpretative efforts. Out of their interpretative practices the contemporary rules of interpretation have been evolved.

It is narrated:

The Companions in case of issues presented to them definitely relied on the considerations of policy for the resolution thereof. It was not considered necessary that there must exist a proof for placing such reliance on consideration of policy or expediency'.[3]

It is narrated that Hazrat 'Umar very carefully dealt with matters involving adjudication.

> He used extreme intellectual effort to find out the wisdom and purpose of a verse and similarly in case of Traditions he tried his level best to have an insight into the purposes which formed the real basis of a particular Tradition. For drawing inferences he placed emphasis on the spirit and the intrinsic merit and was not satisfied by literal meaning.[4]

In some cases the spirit of law and the objectives of religion could be correctly understood in the light of the phraseology, meaning, reference and context while in others it was found necessary to undertake an in-depth enquiry to determine the effective cause. It was often imperative to consider identical precedents and similar situations. The interpretations by the Companions contain a number of examples of both of these methods.

To place interpretation as a source of law on more firmer grounds the Companions organized a system of collective interpretation which later came to be known as consensus.[5] A Council of the legal experts was established. Regular meetings of this Council were held and various controversies and legal issues were considered and operative rules determined after due deliberations. Some of the members of this Council were Hazrat Umar, Hazrat 'Uthman, Hazrat 'Ali, Hazrat Abdul Rahman bin 'Ouph, Hazrat Mu'az bin Jabl, Hazrat 'Ali bin Ka'b and Hazrat Zaid bin Thābit.

Hazrat Abu Bakr' for the decision of a matter involving the interpretation of law as a matter of practice, used to call for consultation a few persons from among the immigrants and inhabitants for the purpose. The members of the said Council were often called for to decide legal controversies.[6]

Those legal problems which were faced for the first time requiring consultation and interpretative efforts were designated as Royal Reserve (Sawaphi-ul-Amr).[7] These legal issues were so designated because no direct and express rule covering them was to be found in the Book and the Traditions. The land which was exclusively reserved for meeting the personal expenses of the King was known as Royal Reserve. As these issues, ques-

tions and problems were within the exclusive jurisdiction of the Council and no other person had the right to interfere in such matters that exclusively fell within the jurisdiction of the State.

Interpretative effort, whether individual or collective, was never at variance with the three specific methods of interpretation laid down by the Prophet. This is evident from the undermentioned illustrations.

Interpretationem Expositoris or Expository Interpretation—

Expository interpretation means the derivations of operative rules by elucidation and clarification of the relevant verses or traditions for ascertaining the meaning and import thereof for the purpose of settling a controversial legal problem.

After the death of the Prophet the most significant problem which the Muslims faced collectively was that of management and distribution of land which came under their control as a result of the conquests of Iraq and Syria.

The differences of opinion regarding this matter was of a serious nature. One group of the Companions held the view that the lands so acquired should be distributed amongst the soldiers. This group besides many others included such important persons as Hazrat Abdul Rahman bin 'Ouph and Hazrat Belāl. While the contrary view was held by the other group of Companions who favoured the viewpoint that such lands must be left in the possession of the original holders and ought not be distributed to the combatants. This group also included some of the distinguished persons of that era such as Hazrat 'Umar, Hazrat 'Uthman, Hazrat Talha" and Hazrat Mu'az bin Jabel.

The first group in support of their argument quoted the following verse:

And know that out of
All the booty that ye
May acquire (in war),

A fifth share is assigned
To God—and to the Apostle,
And to near relatives,
Orphans, the needy,
And the way-farer,—
If ye do believe in God
And in the revelation
We sent down to our servant
On the Day of Testing,—
The Day of the meeting
Of the two forces.
For God hath power
Over all things. (8:41)

They argued that in the relevant verse the property acquired as a result of a just war is to be distributed in the following manner.

One-fifth is to be distributed according to the order of distribution to the groups expressly indicated in the verse while the rest is for the benefit of the soldiers. By way of identical precedents they pointed out that the Prophet himself distributed the land of Khaiber, Banoo Kuraza and Banoo Nazir amongst the soldiers.

The other group countered this argument and pointed out that the said verse expressly provides for the distribution of one-fifth of the property acquired through a just war but it is silent as to the rest of such property. It means that the state had the discretion, either to leave it in the possession of the original holders or utilise it for some public purpose or distribute it amongst the soldiers. They further pointed out that the Prophet himself allowed a part of the lands of Khaibert to remain with the original holders and likewise he ordered tha all the lands of Mecca and the valley of Alkara shall remain with the original holders.

Both the groups insisted that their point of view was correct and should be accepted with the result that the consultation turned out to be a fruitless exercise. As both the groups refused

to yield Hazrat 'Umar had no alternative but to adjourn the meeting. He did so with the object and purpose that all concerned may once again think and reflect about the issues involved in the light of the principles laid down in the Grand Qur-ān. Hazrat 'Umar, in view of the delicate nature of the matter called a second meeting without any inordinate delay and also called ten respectable persons from among the inhabitants (Ansar).

After praises to Allah, Hazrat 'Umar addressed the members of the meeting in the following words:

> I have called you, (the members) for the purpose, that the burden of trust which you have laid on my shoulders may also be shared by you. I am speaking in my personal capacity and not as the Khalipha. Every person has a right to express his views about the matter in issue. An earlier meeting had already been held in which some persons opposed my opinion and others supported it. I never want that you people should follow my opinion in preference to the righteous tone. I want to draw your attention to the truth only. As I have the Book, you also possess the same which proclaims nothing but truth and is definitely reliable. You give me your opinion in the light of the Book as what is contained therein is binding upon all of us and to follow it is the sacred obligation of all of us.

At this juncture Hazrat 'Umar elucidated and explained the said verse and pointed out its legal implications with reference to the following verses which deal with the property which may fall under the control of Muslims as a result of a war where actual fighting was not involved.

> What God has bestowed
> On His Apostle and taken
> Away from the people
> Of the townships,—belongs
> To God, to His Apostle
> And to kindered and orphan
> The needy and the way-farer;

In order that it may not
(Merely) make a circuit
Between the wealthy among you.
So take what the Apostle
Assigns to you, and deny
Yourselves that which he
Withholds from you.
And fear God; for God
Is strict in punishment. (59 : 7)

(Some part is due)
To the indigent Mahajirs,
Those who were expelled
From their homes and their property,
While seeking Grace from God
And (His) Good Pleasure,
And aiding God and His Apostle:
Such are indeed
The sincere ones;— (59 : 8)

But those who
Before them, had homes
(In Medina)
And had adopted the Faith,—
Show their affection to such
As came to them for refuge,
And entertain no desire
In their hearts for things
Given to the (latter),
But give them preference
Over themselves, even though
Poverty was their (own lot).
And whose saved from
The covetousness of their own
Souls,—they are the ones
That achieve prosperity. (59 : 9)

And those who came
After them say: "Our Lord'!
Forgive us, and our brethren

Who came before us
Into the Faith,
And leave not,
In our hearts,
Rancour (or sense of injury)
Against those who have believed.
Our Lord! Thou art
Indeed Full of kindness,
Most Merciful." (59 : 10)

He argued that such property does not exclusively belong to the soldiers and in fact all present and future members of the community have a share in it. The purpose is that the wealth may not make a circuit within a class or people. In the said verses no distinction has been drawn between combatants and non-combatants and instead the right of specified persons is expressly provided for. In the light of this elucidation and exposition of the various verses he clarified the legal issues involved and the warring groups came to accept the correct point of view. It was decided by mutual consent that the management shall remain in the hands of the state while the original holders shall continue to be in possession of their land. In short, the land will not be distributed among the soldiers.

The people declared that; "O, 'Umar, your view in this matter is correct. What you perceive and express is the truth."[8]

Interpretationem Deducere or Deductive Inductive Interpretation: An Example

Deductive Inductive interpretation denotes the process of deducing operative rules from the parent text on the basis of the "effective cause" of an injunction through intellectual effort. Other legal issues are thereafter resolved by the application of the operative rules based on a particular effective cause.

After the death of the Prophet, Hazrat Abu Bakr was chosen as the head of the Islamic State. Just after the assumption of office he had to deal with the serious question of

Apostacy. Some tribes living around Medina refused to obey the religious obligation of payment of Welfare Tax (Zakāt) to the central government. Some of them openly renounced the religious obligation and were motivated by greed and miserliness. Others, were opposed to the payment of Welfare Tax to the Central Government but were otherwise willing to pay the same. In short, while the former denied the very duty to pay Welfare Tax the latter denied, the authority of the Central Government to collect it.

The views of the two groups have been narrated as follows:

i) By God we had not renounced faith but were mislead by greed and miserliness.[9]

ii) We will perform the prayer and observe other religious/ legal commandments but we will not pay welfare tax to Abu Bakr.[10]

These two conditions were unacceptable as both were opposed to the interests of the nascent State. In the first case there was collective renunciation of an obligatory Islamic duty, while the other was destructive to the authority of the Central Government. Those who denied Central authority were in fact providing strength to the rebellion.

Hazrat Abu Bakr rightly decided to wage war against the rebellious tribes. However, Hazrat 'Umar controverted this decision on the ground that the members of these tribes were nonetheless Muslims and waging war against the believers was not allowed by the Islamic Law. He pointed out that:

> How can you wage war against the tribes in view of the injunction that fighting is permissible only till the people accept Faith. Therefore, whosoever accepts Faith by pronouncing the formula "there is no God but Allah of the Universe" protects his life and property. As regards the other acts of such a person Allah will be his judge. However, where an obligation or right of the very words of this formula is involved you can act in a different manner.[11]

Hazrat Abu Bakr's decision to wage war against these tribes was inconsonance with the practice of the Prophet and the Qurānic Rule found in the following verse:

> But when the Forbidden months
> Are past, then fight and slay
> The Pagans wherever ye find them,
> And seize them, beleaguer them,
> And lie in wait for them,
> In every stratagem (of war);
> But if they repent,
> And establish regular prayers
> And practise regular charity,
> Then open the way for them:
> For God is oft-forgiving,
> Most Merciful. (9:5)

So far as the obligatory nature of the duty to perform prayers and the payment of Welfare Tax is concerned, no distinction is permissible. A person must accept both of them if he wants to protect himself and his property against war. If either of the two is rejected, then the rule that 'don't interfere with them' will not apply. Further, Hazrat Abu Bakr, by way of identical precedent, narrated an event which occured during the life time of the Prophet. It is narrated that: A delegation of the members of Banu-Thaqiph came from Ta'iph and presented itself before the Prophet. The members of the delegation expressed their willingness to embrace Islam if some stipulations were accepted. The Prophet pointed out that 'faith without prayer was devoid of all benefit.'[12]

On the basis of the Qurānic verse and the practice of the Prophet Hazrat Abu Bakr treated both Welfare Tax and Prayer as equally obligatory and firmly declared that: By God, I will certainly fight that man who differentiates between Welfare Tax and Prayer because the former is the necessary incidence of wealth.[13]

To clarify his point of view he further said that if people demand the abandonment of prayer, fasting and pilgrimage (as

they have done in case of Welfare Tax) then how any of the essential elements of Faith can remain intact?[14]

Thus abandonment of Welfare Tax can never be accepted and waging war against such rejectors was an imperative duty, as there is no distinction between prayer, fasting, pilgrimage and Welfare Tax. The 'effective cause' of this order is the collective renunciation of an essential element of faith. Therefore, same rule shall apply to the non-payment of Welfare Tax which applies to the abandonment of the prayers.

He further explained to Haẓrat 'Umar that he had decided to wage war because the payment of Welfare Tax was an incident of the acceptance of faith by reciting the formula that, 'there is no God but the Allah of Universe.'

Initially this intricate reasoning could not be appreciated by Hazrat 'Umar, but after discussion and elucidation he finally understood the legitimacy of this reasoning and whole-heartedly accepted the point of view of Hazrat Abu Bakr.

He proclaimed that: By God, now I understand, Allah has enlightened Abu Bakr about waging war and I also recognize that it was the truth.[15]

Thus Haẓrat 'Umar also accepted the view that the effective cause of the injunction contained in the verse was 'renunciation of an essential element of faith'. As this cause existed in case of the abandonment of prayers it also existed to an identical extent in case of the rejection of Welfare Tax. In fact this cause exists in all cases of the abandonment of fasting, prayers, pilgrimage and Welfare Tax.

Interpretationem Polititia or Expediential Interpretation: An Example

Expediential Interpretation denotes the method of interpretation where an operative rule is derived by inter-working the spirit of law and the interests of the public policy. In fact it denotes as attempt to reconcile the demands of public policy

and the principles of Islamic law in a manner where the demands of the former are satisfied without any violation of the latter.

Haẓrat 'Umar, acquired a pasture land without payment of compensation for a public purpose. According to the general law, such acquisition of property was not permissible as the pasture land was owned by the believers. An 'Arab presented himself before Haẓrat 'Umar and pointed out that: O' the leader of the believers we fought for this pasture land during the days of ignorance and embraced Islam while standing on it. How can you deprive us of its use as a matter of right.[16]

Haẓrat 'Umar, pointed out to the tribesman the exigencies of public policy and the spirit of the Islamic law. He explained that property may be acquired by the State whenever necessary in the public interest.

He declared that: 'all property belongs to Allah as all people belong to Him. I will not agree with your point of view.'[17]

Ibn Hajr 'Ṣqalāny maintains that it was fallow land which was not particularly owned by anybody. But the fact is that it was pasture land and the residents of Medina and people living near and around derived benefit from this land. The ownership was undoubtedly that of the people of Medina as is clearly expressed by the demand of the tribesman. Further, a person by the name of Haney was appointed by Haẓrat 'Umar as the care-taker of this pasture land. Certain directions were also issued to him. The nature of these instructions clearly indicated that the pasture land was owned by the people of Medina.[18]

This action of Haẓrat 'Umar is a clear example of expediential interpretation as public policy formed the basis of the order of acquisition of property for public purposes without the payment of compensation.

Differences of opinion among the companions in the field of Expository Interpretation : An Example

The three methods of interpretation involve the application of one's own reasoning and hence differences of opinion are inevitable. A number of examples of such differences are found in the interpretations given by various companions. An example of differences of opinion in tne field of expository interpretation is as follows:

According to Hazrat Abdullah bin Mas'wd the waiting period for a pregnant widow will be till the time she is delivered of the child. According to Hazrat 'Ali the waiting period will be either four months ten days or the delivery of the child whichever is longer in case of a widow. The relevant Qurānic verses are:

If any of you die
And leave widows behind,
They shall wait concerning themselves
Four months and ten days:
When they have fulfilled
Their term, there is no blame
On you if they dispose
Of themselves in a just
And reasonable manner
And God is well acquainted
With what ye do. (2:234)

Such of your women
As have passed the age
Of monthly courses, for them
The prescribed period, if ye
Have any doubts, is
Three months, and for those
Who have no courses
(it is the same):
For those who carry
(life within their wombs),
Their period is until

They deliver their burdens:
And for those who
Fear God, He will
Make their path easy. (65:4)

That is the command
Of God, which He
Has sent down to you:
And if any one fears God,
He will remove his ills
From him, and will enlarge
His reward. (65:5)

The difference of opinion arose in the determination of the legal effect of these verses. Hazrat Abdullah bin Mas'wd considered the second verse as of general applicability and accordingly laid down the waiting period for the pregnant women as till the time they are delivered of their burdens. He treated the first verse as of limited applicability and laid down that the waiting period for the widows who were not pregnant will be four months and ten days. On the other hand Hazrat 'Ali treated the two verses as of general applicability and laid down that the waiting period for a pregnant widow will be till the delivery of the child or four months ten days whichever is longer.

In the field of Deductive Interpretation also differences of opinion often arose and a number of such cases are narrated. For instance Hazrat Abu Bakr, Hazrat Abdullah bin Abbas and Hazrat Abdullah bin Zubair held the view that, in the presence of the grandfather the brothers will not receive any property by way of inheritance. By way of Analogy they equated father and grandfather. As brothers have no right of inheritance in the presence of father therefore according to their view the brothers will be excluded as heirs by the grandfather.

However, Hazrat 'Ali, Hazrat Zaid bin Thabit and Hazrat Abdullah bin Mas'wd held the view that it was not correct to equate father and grandfather as the latter was different in some respects from the former. Hence brothers will receive the property by way of inheritance even in the presence of the

grandfather. In short, grandfather does not exclude brothers as heirs.[19]

In the field of expediential interpretation a number of examples of such differences of opinion are found and one of them is explained below by way of illustration.

In case of a divorcee who married during her waiting period, Hazrat 'Umar punished the husband and few stripes were administered. Thereafter he ordered separation between the spouses. He further declared that, a woman who marries during her waiting period and consummation also takes place then she will be forbidden to the husband permanently.[20] But according to Hazrat 'Ali in such a case the husband can remarry the divorcee after the expiry of the waiting period. The rule laid down by Hazrat 'Umar was predominantly conditioned by public policy. The judgment of Hazrat 'Ali was according to the general principles of law only.

Differences of Opinion and Interpretation

The differences of opinion among companions made the expansion of the horizons of law possible and made the enforcement easier and more scientific. Further, the believers found it more convenient to observe the rules and the regulations evolved in the light of the foundational principles of Islamic law by the interpretators. It is narrated that the Prophet had stated that 'the differences of opinion among my followers is in fact a mercy of Allah.' In other words the circumstances or events which relate to the details of legal principles may be taken care of and appropriate operative rules may be evolved keeping in view the interests of public policy.[21]

Hazrat 'Umar bin Abdul 'Aziz was of the view that, it was not correct to hold that the companions should not have differed from each other in matters of legal interpretation. Because if there had been only a single view point then it would have placed the people in many difficulties. Companions are imitables and it is imperative to follow their views. Thus, if one follows a particular rule from among many points of view

then he will be presumed to have followed the precepts of the Prophet [22].

In spite of the divergence of views among the companions the sphere of the application of Interpretation remained limited. They confined the use of the interpretative effort to lay down appropriate operative rules governing the actual controversies confronted at any given time. They had neither the time nor the inclination to engage in scholarly discussions about theoretical problems. The actual legislative needs of the Islamic society had increased so much that to deal with them successfully was by itself no mean achievement.

Some of the companions used their own interpretative effort for laying down operative rules extensively, while others used it sparingly. This difference was due to two factors. Firstly, natural aptitude for interpretation was not bestowed equally on the members of the two groups. Secondly, occasions for use of the interpretative technique did not occur in equal number as regards the two sections of the companions. In short, while some of them had a special aptitude for interpretation and also had more opportunities to use their intellectual effort in enriching the Islamic law, others were not so in endowed and had lesser number of occasions to use their interpretative efforts.

Hazrat 'Umar, Hazrat 'Ali and Hazrat Abdullah bin Mas'wd not only had an instinctive discernment for interpretation but also had many opportunities to exercise it. Further there was no alternative but to take recourse to interpretation as a source of law to meet the increasing number of legal controversies which arose during their time. For this reason they became renowned interpreters while others could not find recognition on a similar scale.

The list of the issues regarding which the companions were called upon to use their interpretative effort is pretty long, but an overall survey reveals that all such efforts were within the limits of the three methods of interpretation used by the Prophet. Some of the companions used one of these methods extensively while others employed the other methods

on a large scale. It is a wrong impression that each group used a particular method exclusively and rejected others. For example, Hazrat 'Umar in administrative matters employed expediential interpretation and in case of legal matters he used deductive interpretation extensively. On the other hand Hazrat 'Ali used both expediential and deductive interpretation more frequently. It may also be noted that Hazrat 'Umar also employed expository interpretation quite frequently.

In fact, whatever may be the method of interpretation the use of opinion is indispensible. Companions did certainly use their opinions but it was not 'free opinion'. The use of opinion was regulated and controlled by specific rules so as to ensure that the conclusions arrived at were not at variance with the basic principles of Islamic law. For instance:

i) The opinion must have been drawn from the Qur-ān or the traditions though reasoning as was the case when Hazrat 'Umar decided the controversy relating to the distribution of enemy property.

ii) It must be based on analogy drawn from identical precedents as was the case when Hazrat Abu Bakr equated Welfare Tax and Prayers for settling the question of waging war against the tribesmen who refused to pay Welfare Tax.

iii) The opinion should be based on some general principle of law, e.g.

"....
God puts no burden
On any person beyond
What He has given him.
After a difficulty, God
Will soon grant relief." (65:7)

These three principles are of immense value and a proper use of management thereof will be adequate to deal effectively with infinite variety of problems which a society faces at every stage of its development.

In fact, one of the functions of Prophethood is to create a group of people capable of establishing a well ordered society on the foundations laid down by it. As the sagacity of Prophethood provides a basic blue print for the creation of a just society. Likewise the interpretative perception of the said groups of the people is responsible for completion of the unfinished tasks of interpretation.

It is quite logical and manifest that even a Messenger of Allah cannot be expected to lay down detailed and complete instructions covering all human action in the present and future. However, he did lay down basic doctrines or tenets which provide complete guidance for the resolution of all legal and human problems. The said group of companions was responsible for carrying out the Mission of the Prophet. Thus, it was obligatory on the parts of its members to provide necessary instructions to regulate and control the course of human action after the life time of the Messenger. This function was performed by means of operative rules deduced from the basic doctrines and tenets through the medium of reasoning. The derivation of operational rule of conduct from the doctrines and tenets was governed by the rules of interpretation laid down by the Messenger. The real worth of the 'model' laid down by the Messenger was realised after his life time as it enables those who have to find out practical answers to the very practical needs of a developing society at any given time. In such a situation the use of opinion was both legitimate and valuable but there is no place in Islam, for 'uncontrolled opinion' as a source of law. The question of ignoring or by-passing the instruction found in the Qur-ān and illustrated by traditions does not arise. Accordingly, whenever opinion was given a free rein the offender was severely criticised and sternly reprimanded. A discussion of such instances is purposely omitted here as it is not relevant in a study of this kind.

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Chapter 3

General Development of Interpretation

The Second Phase: The Contribution of Obedients

Rapid cultural expansion, multiple conquests, development of education and learning obliged the Obedients (Tabi'ın) to employ interpretative effort extensively for the resolution of legal issues much more than their predecessors. Accordingly, they extended its operational horizons to hitherto unknown spheres. For this purpose, firstly, they collected the traditions and the compilation thereof was done at the official level. Secondly, they systematically compiled the large number of known opinions, edicts and verdicts of the companions. Finally, they infused learning and skill into the art of interpretation.

The real need to collect and compile the Traditions was felt for the first time when most of the companions left Madina and took up residence in far flung cities and countries. So long, as they lived in Madina no such need was strongly felt as requisite information could be gainfully obtained from them in person and from their personal records.

Certain other reasons were also responsible for the non-compilation of Traditions at that time and the following may be noted:

(a) The most valuable task which took precedence over all others was the compilation of Revelation, i.e., the Grand Qur-ān. The compilation of Traditions (Hadith) was not undertaken simultaneously as it was felt that the two might mix up as it was not possible to ensure the necessary care to this dual task.

(b) The number of scribes available was also inadequate, the task was stupendous as the Traditions spread over twenty three years of the life time of the Apostle of Allah had to be compiled. Further the State had to deal with an infinite variety of human problems beside the normal duties of maintaining law and order and defence. Consequently, the compilation of Traditions took a back seat.

Arabs had immense confidence in their memory and actually preferred it to other methods of preservation of knowledge. Scribing was not exclusively relied upon for the preservation of Traditions for posterity. Narrations, (Riwaiāt) particularly by those who were just and reliable found general approbation and acceptability. There were many Narrators (Rāwy) from among the Companions and some of them narrated sparingly while others did it on a large scale. Consequently, they were not endangered in the absence of written records. Moreover, quite a number of companions had their own personal records in the book form.

Among the Obedients Hazrat 'Umar bin-Abdul 'Aziz did pioneering work in this area. He wrote letters to Doctors of Law, Religious teachers and Officials requesting them to contribute to the cause of the compilation of Traditions. He also asked all those living in Madina or elsewhere to send every bit of knowledge which may be useful for this purpose. He completed this assignment with devotion, diligence and skill and received alround acclaim for his sincere exertions.[1] Even an antagonist like Goldzehir had admitted this fact and points out that:

> For the noble task of compilation of Traditions the traditionists searched from one corner of the world to another, from Undluss to Central Asia. They travelled from place to place mostly on foot to contact and communicate with others. During that period there was no better, authentic and reliable method of the collection of Traditions than personal contact and face to face discussion. They were people of character and caliber and such honourable titles as "Travel-

lers" and "Tourist" were not wasted on them. To accuse them of imagination or exaggeration, is nothing but a grave error and untruth. They did not undertake these hardships and toil for pleasure or experimentation and their sole aim was to meet traditionists wherever found to collect as many Traditions as possible. Their striving may be aptly described by the similitude of the Roaming Bird who in her roamings alights on every tree and rests on every branch for drawing sustenance from each leave experiencing the most soul stirring spiritual pleasure.[2]

This collection of Traditions represented a glittering treasure of laws, and Operative Orders both original and Derivative, richly endowed with known opinions, interpretation and precepts of the Apostle of Allah. But as an uncut diamond needs cutting and polishing, similarly, it required sifting and classification. The obedients performed this onerous task credibly and divided it into two sections, characterising one as the thought of *the people of the Medina* and the other as that of the *people of Kupha.* The former got lesser opportunities for the employment of interpretative technique as compared to the *people of Kupha.* The latter adopted a very liberal attitude about the use of interpretative effort. Further as compared to the former they faced many more problems and issues demanding resolution and were constrained to make an extensive use of the 'intrinsic merit' technique of interpretation through sincere intellectual effort, wherein reason and opinion played the dominant role. The collection of Traditions at their disposal was scanty and hardly adequate to meet their needs. They thus, had no alternative but to expand their own reason and skill to discover the core content of Islamic principles and to deduce Operative Orders to meet the needs of the society and the country.

Distinguished Interpreters among the people of Medina were Hazrat(s) 'Umar bin Khattāb, Zaid bin-Thabit and interpreteress Hazrat 'Aaisha. Obedients were represented principally by Saeed bin Museeb though, there were many other interpreters among them. Among the people of Kupha, the renowned interpreters were Hazrat 'Umar, 'Ali and Abdullah bin Mas'wd

while Ibrahim Nakhaphi was the most prominent amongst the Obedients of Kupha.

The people of Madina relied heavily on the people of Mecca and Madina (Hazrat 'Umar, Zaid bin Thabit and interpreteress 'Aaisha) in matters of law and considered them more reliable than others. They followed their opinions, edicts and verdicts to the exclusion of all others. Where they found consensus amongst them on any particular issue of controversy they followed it unquestionably. But where a conflict of views existed among them, they preferred the firmer and the better reasoned rule. However, whenever they found no relevant precept in the decisions of the masters they used their own interpretative effort employing inductive-deductive methods of interpretation, (using the tools of expulsion and deduction) to derive an Operative Order from the existing judicial materials in the light of the parent sources of Islamic law (Grand Qur-ān and Hadith). Whenever necessary, they resorted to Expediential interpretation and the chief characteristic of their interpretative effort was a marked reluctance to give free play to analogy and opinion.

On the other hand, people of Kupha exclusively followed the known opinion, edicts and verdicts of Hazrat 'Umar, 'Ali and Abdullah bin Mas'wd as they had absolute faith in the authenticity and correctness thereof. Their preference was definite and seldom departed from as a settled course of action. When differences existed among the said Companions, then they followed the more credible and well reasoned view point. Whenever this search proved futile they used their own reason and wisdom. Their intellectual effort was marked by extensive use of analogy and opinion.

Initially people of Medina were the more acclaimed interpreters, but later on people of Kupha came to dominate the legal scene. The differences between these two currents of legal thought were not significant enough to attract the attention in the beginning but with the passage of time they assumed serious dimensions. Ultimately, the two could not interwork and two separate schools of legal thought were established. These different processes of reflection and deduction existed even during the

period of Prophethood but as the Companions lived together and received direct instruction from the Apostle they never assumed the dimensions of a serious conflict. However, when the Companions separated from each other and encountered different sets of circumstances, their difference of thought process assumed the unhappy shape of two opposing camps destroying the unity of legal thought forever after. Nevertheless they played a foundational role in the establishment of Islamic law of such proportions that this era is called "the period of Establishment". Happily enough, during this period blending of learning and narrative became an accepted norm of Interpretative effort directed to discover cperative rules to meet the ever-growing legal needs of a developing society.

The obedients laid down various principles for the regulation of *logical process of thought involved in the art of interpretation.* They carefully considered and analysed the interpretations of the Companions to ascertain the degree and kind of emphasis they placed on 'words', 'meaning' and 'effective cause' in drawing inferences from the Texts (Qur-ān and Hadith).

Words used in the Text may be either particular or general. Particular words always refer to a definite referent while general words refer to more than one referent. In other words particular words specifically denote a particular thing while general words equally indicate or cover more than one thing. To treat particular words as general words some reason or mode which refers to the particular sense in which the word is used must exist as supportive reasoning. The specific mode or manner in which a word is used is a factor which is decisive in such cases.

For example : the name ZAID if used in a sentence will particular apply to a specific person. But where the word MAN is used then by implication it will apply to all males because it cannot be taken to apply to a particular person unless the context indicates otherwise.

Similarly, sometimes general words may be used in a particular sense, e.g., in the expression "God has permitted sale" the

nature of the Order is of general applicability. But on the other hand the expression "God has prohibited usury" the nature of the Order is apparently general but in the particular sense it distinguishes between transactions of 'sale' and 'usury'. The former is allowed while the latter is prohibited under Islamic law.

Further some words may have *multiple meaning* each referring to a particular *referent* and others capable of been taken to mean different things at one and the same time. Such words found require further enquiry to fix their particular meaning having regard to the context in which used. Thus such words may mean one thing in one context, and another in a different context e.g., the arabic word ('AIN) is used to convey different meanings in different contexts.

Likewise sometimes words used do not convey an operative order for application to other cases of a like nature and mention a single referent in the statement concerned. In such cases it becomes imperative to duly deliberate to discover the 'effective cause' of the rule laid down. Thereafter such a rule shall be taken to be applicable to all those cases where such an effective cause exists.

For example, the rule "cut off the hand of thieves" is a statement which expressly lays down punishment for a thief and does not refer to 'pick-pocket' but it is also clear that the nature of the act i.e. stealing is the effective cause of the rule. Therefore, this Original Operative Order shall apply in all cases where a person is found guilty of stealing. A pick-pocket or any other person who is guilty of stealing shall be covered by this rule because of the similar nature of the act committed. In other words, from this statement we can legitimately derive the operational rule of punishment to be applied in all those cases where unjust removal of property from the possession of a legal owner is involved. Thus a rule may have express and implied meaning at one and the same time which can be deduced by considering the phraseology of a sentence.

Sometimes, meaning clearly indicates a specific referent or things and such expression is intended rather than accidental.

In majority of cases, this particular sense could be easily gathered from the plain meaning of the words used in an expression. In other cases the legal effect of a statement may refer to certain other things by way of indication.

For example:

"……
But he shall bear the cost
Of their foods and clothing
On equitable terms……" (2:232)

In this verse the Operative Order that the expenses of the suckling mother shall be an obligation on the husband is both express and intended. The paternal relationship is the basis of this rule which is merely 'indicated' by way of implication.

Thus a single phrase may contain beside the referent some other objects signified by the use of an 'indicator' or symbol.

Similarly the effective causes which constitute the proof of an order are not always of the same nature and degree. Some may be narrated while others may be deduced by way of inference. Some such derivations may be approved unanimously while in some cases such a deduction may be disputed. The above variants of the methods of interpretation to understand the Text, are mentioned by way of instances to establish the fact that the obedients tried their level best to infuse scientific temperament in the art of drawing inferences from the text through reasoning. Thus, the art of interpretation was firmly placed on a scientific footing which immensely helped its expansion. They developed various variants of the three principal methods of interpretation; Expository Interpretation, Deductive —Inductive Interpretation and Expediental Interpretation, as laid down by the Prophet and developed by his Companions. These rules relating to the deduction of legally operative rules from the Texts provided the necessary infra-structure for the use of interpretation for the regulation of the various spheres of human action by means of His Law.

Thereafter, the Obedients (Tabi'ın) particularly directed their intellectual efforts to ponder about the question of change of legal rules to meet the changed conditions and circumstances which necessarily demanded a different set of legal rules having general applicability. Such a change could be legitimately affected, was a proposition well supported by the practices of Companions. The pre-existing interpretations of companions contained many examples of the rule, that a change of conditions and circumstances justified a change in the Law and Operative Orders operating at the enforcement level.

The above rule that changed conditions and circumstances may be dealt with by making a corresponding change in the rules and regulations does not mean that Basic Tenets of Islamic law may be changed or repealed. It simply denotes a change of Operative rules at the enforcement level to ensure the attainment of the purposes prescribed by a Fundamental Universal principles found in the Qur-ān. Thus, this rule permits the determination of the situation or occasion when a pre-existing rule may or may not apply. Further this proposition exclusively applies to those precepts which are based on expediency or public policy relevant at a given time. Such changed rules remain operative only till such expediency or policy considerations continues to exist. As soon as they no more exist the old rules are revived. Likewise if the same expediency or policy is revived at any time in future then such precepts are revived and reinstated. Many examples of such change of rules and regulations are found in the interpretations and decisions of Hazrat 'Umar.

Different views about the acceptability of interpretations arising out of consensus of various kinds also helped the expansion of interpretation to new areas of human action. The following kinds of consensus may be carefully noted:

1. An Operative Order which is unanimously approved by the people of Madina is called 'definite [Real] consensus'. [Ijma' Waq'y]

2. An Operative Order which is unanimously accepted by

the scholars of Islamic law is know as 'Scholar's consensus'. [Ijma' Zat'y]

3. An Operative Order derived through interpretation and accepted unanimously as correct is called 'Consensus on point of Law'. [Ijma' Ijtehady]

4. Where there is agreement that a rule is one which has been correctly narrated it is designated as Consensus on point of fact. [Ijma' Naqly]

5. A legal rule which has been unanimously approved by the scholars either through deed or words is known as 'Express consensus'. [Ijma' Qoly]

6. A rule of law which is expressly approved by deed or words by some of the scholars while the rest are silent or have expressed no opinion is characterised as 'Implied [Tacit] consensus'. [Ijma' Sukuty]

Inspite of the general agreement relating to the reliability of consensus as a source of Islamic legal rules there existed a difference of opinion regarding its modes as a proof of its acceptance. Some aggreed with some of the modes as valid while others differed. Many scholars resorted to their own mental exertions to lay down legal rules covering the area of such consensus with which they did not agree. However, the Obedients in different ways ensured the development of Islamic law and Jurisprudence (science of law) on the basis of scientific rules of interpretation.

Three different sets of circumstances were clearly identified where rules and regulations derived through interpretation might be used legitimately:

(a) those new problems or legal issues which arose out of rapid cultural expansion, multiplicity of conquests growth of scholarship and development of formal education.

(b) Those problems or legal issues which were covered by

pre-existing Operative Orders derived by means of interpretation. But because of the changed circumstances and conditions of life the object of such rules was being defeated or an observance thereof produced extra-ordinary hardships. In such cases a revision was considered necessary to meet these exigencies of time and place.

(c) Those problems or legal issues which were covered by rules found in the text but because of expediency the companions had determined the application thereof to particular situations or occasions. Some such rules based on expediential interpretation needed revision while others demanded no such reconsideration and revision. For example, the rule that to win over others no payment could be made out of welfare tax (Zakāt) need no revision.

However, the rule laid down by Hazrat 'Umar because of the considerations of expediency that marriage with the women members of the people of the Book was the prohibited needed reconsideration and change because of the absence of circumstances which required such a rule. Thus rules based on expediency or public policy necessarily require and can be replaced by revised new rules.

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Chapter 4

General Development of Interpretation

The Third Phase: Leaders of Interpreters

During this period a large number of nations either adopted Islam as a faith or were ruled by the Islamic State, such as, Irani's, Rumi's, Kaldani, Habashi, Qabti, Turkistani and Sindhi etc. Each of these nations had their own distinctive culture, administrative organisation and laws. Their economic, social and political affairs, their habits and life pattern were all different from that of the Muslims. The Iranian and Roman culture and law dominated the scene in some places.

The intermixing of the Islamic way of life, culture and law with the said national characteristics of variety of national groups produced a struggle and interworking of the two brought to the fore new problems to be resolved according to normative Islamic principles having regard to the peculiar conditions obtaining in particular lands. The leaders of Interpreters dealt with these matters in an effective manner and in this process prescribed valuable rules of interpretation whereby it became easy to enforce the normative principles of Islamic law. These rules of interpretation are of lasting value and provide a dependable means to meet the new challenges of changing times at any point of time.

Islamic law is a living vibrant phenomenon for the whole humanity and for all times and lays down a pattern for the establishment and continuance of a well-ordered society free from the eternal problem of 'conflicting interests' ensuring maximum good to all the members of a society. To bring law and life together it is essential that the normative principles are carried out in the best possible manner having regard to

the social, political, economic and cultural circumstances of a society. This role of the realisation of Islamic goals in fact is largely played by the rules of interpretation.

The rules of interpretation devised by the Leaders of Interpreters are discussed at length in the subsequent pages of this study.

Chapter 5

Interpretationem Expositoris

Expository Interpretation [Ijtehad-e-Tauzihy]

Expository interpretation involves a close examination of the words, meaning and context of a text to derive an operative order or rule. Primarily, it consists of three sets of interpretative rules, i.e., implication of text, adhesive text and policy of the text.

The first rule, 'implication of the text' is further sub-divided into three rules, that is : (a) Textual phraseology; (b) Textual connotation; and (c) Textual pre-requisite.

Textual Phraseology ['Ibaratul-Naṣ]

An order or rule which could be plainly understood and is in fact the primary objective of the text is said to be a rule derived from the phraseology of the text. Briefly, where the phraseology is so clear that it leaves no doubt about the rule conveyed thereby then no further inquiry is necessary for the purpose of the elucidation of the matter.[1]

If you fear that ye shall not
Be able to deal justly
With the orphans,
Marry women of your choice,
Two, or three, or four;
But if you fear that ye shall not
Be able to deal justly (with them),
Then ONLY ONE, or (a captive)
That your right hands possess.
That will be more suitable,

To prevent you
From doing injustice. (4:3)

The phraseology of the verse plainly provides that a person can marry upto four wives provided he could deal with all of them justly, but *where one fears* that it *may not be possible* for him to keep a *just balance* between women, then he is *required to restrict* himself to ONE WIFE or alternatively have a captive as the other wife. The verse also lays down the rule that marriage is the bond which binds the spouses and is the basic unit of the society.

Those who devour usury
Will not stand except
As stands one whom
The Evil One by his touch
Hath driven to madness.
That is because they say:
"Trade is like usury",
But God hath permitted trade
And forbidden usury. (2:275)

The phraseology of this verse enlightens us about the rule that usury and trade are distinct and while the former is prohibited the latter could be lawfully carried on by the believers. All the forms of usury are prohibited and trade, business or profession are the lawful sources to earn money adequate enough to suffice for the expenses of a comfortable living. Luxurious living is clearly condemned in as much as the believers are told in no uncertain terms not to spend for vanities or the satiation of selfish desires.

Connotation of the Text (Isharatul-Naṣ)

Where an order could neither be understood from the text nor the text is meant for it, but an indication about the order is found in the text. Such a rule is said to be based on the connotation of the text.[2]

For example, the aforementioned verse provides that justice

and liberality must be practised by the husband though the wives may be one or more. The connotation of the text leaves no doubt about this rule. Yet another illustration of the rule is found in the undermentioned verse:

> The mothers shall give suck
> To their off-spring
> For two whole years,
> If the father desires
> To complete the TERM.
> But he shall bear the cost
> Of their FOOD and CLOTHING
> ON EQUITABLE TERMS. (2:233)

The connotation of the text makes it clear that lineage of the off-spring is referable to father only. On the other hand the phraseology of the text positively lays the burden of providing maintenance during such period (two years) squarely on the shoulders of the father.

Textual Pre-Requisite [Iqtezai'-Naṣ]

A legal effect (rule) is taken to be proved by textual pre-requisite where the existence of some 'additional word' is presumed which makes the statement meaningful. Such an additional word is not alien to the statement and is a part of it though not expressly mentioned. However, the meaning of the statement is rendered complete only when such a word is added.[3] Ordinarily these 'additions' are of three kinds:

(i) Where the truth of a statement depends upon the additional word, for example:

> Apostle of *Allah* declared that, 'negligence and forgetfulness has been removed from my followers'.[4]

This statement, as such, is not correct as negligent acts do occur. Thus, to render it correct, it is necessary to supply an additional word. The context indicates that this word should be 'sin'. When this word is added, then

the statement is rendered to mean that, 'the sin for negligent acts has been forgiven in case of *Muslims*.'[5]

(ii) Where the logically correct rendering of the statement depends upon the assumption of an additional word, for example:

The Qur-ān lays down: "Demand from villages" (12:82)

Obviously the statement is illogical because something cannot be demanded from the villages. Thus, it is necessary to introduce the word 'inhabitants' to it. After this addition the statement is rendered as "demand from the inhabitants of the villages." The additions thus, render the statement logically correct.

(iii) Where the correctness of the statement according to *Sharia* depends upon the additional word, for example:

But if any remission
Is made by the brother
Of the slain, then grant
Any reasonable demand,
And compensate him
With handsome gratitude. (2:178)

In this statement the matter of demand and payment can be correctly understood only if the word 'wealth' is taken to be the additional word.

Some Rules Relating to Textual Pre-Requisite

Where, having regard to the context, the additional word is definite, then whether it is of 'general' or 'particular' import it will be applied to an original legal principle, for example:

Forbidden to you
Are: dead meat, blood.....(5:4)

In this case, the additional word is 'for food'. After such

addition, the statement will be rendered as; 'forbidden to you (for food) are: dead meat,.....

Another example is:

Prohibited to you are your mothers. (4:23)

Here the additional word is 'for marriage' i.e., prohibited to you (for marriage) are your mothers.

But where the additional word is not definite and more than one can be used, then only that additional word will be utilized which is of general applicability. On this point, there is difference of opinion between the interpreters. One view is that a general word should be used as an additional word, while the other view is that only a word of specific import should be used. This difference of opinion is reflected in many cases, e.g., if a person, because of negligence or ignorance, does something improper during prayers, then according to Shwaphi', Maliki's and Hanabila the prayer will not be rendered void. But according to Ahnāf, the prayer will be rendered void because they do not make any difference between accidental and intentional acts. The two parties of interpreters have their own reasoning, a discussion of which is purposely omitted here.

The Textual Phraseology as a Proof of a Particular Order Shall Take Precedence over Other Rules

The three rules namely, phraseology of the text, textual connotation and textual pre-requisite do not stand on the same footing from the point of view of interpretative value. Phraseology of the text takes precedence over the two others and connotation of the text takes precedence over textual pre-requisite. Hence, in case of conflict, an order derived through the textual phraseology shall be preferred. An example of textual phraseology given precedence over connotation of the text is as follows:

Sura II, Verse 178 of the *Qur-ān* provides that:

O ye who believe!
The Law of Equality

Is prescribed to you
In cases of murder:
The free for the free,
The slave for the slave,
The woman for the woman. (2:178)

This verse expressly lays down the law of equality in cases of murder as is clear from its phraseology. But from another verse, the law of the equality is not proved according to the rule of textual connotation. The other verse is as follows:

If a man kills a Believer
Intentionally, the recompense
Is Hell, to abide therein
(For ever): and the wrath
And the curse of God
Are upon him, and
A dreadful penalty
Is prepared for him. (4:93)

In this verse the punishment which is mentioned is that of the hereafter. No punishment in this world is proved by the rule of textual connotation. But the first verse according to textual phraseology clearly lays down the punishment in this world. Hence the rule of phraseology shall take precedence over that of the connotation of the text.

Another example is provided by the Verse:

If the father desires
To complete the term
But he shall bear the cost
Of their food and clothing
On equitable terms. (2:233)

The verse provides that the father shall pay the necessary expenses of a woman who suckles the child. Therefore, according to textual connotation it is proved that in the matter of the maintenance of the parents, the father shall take precedence over the mother. Thus where the off-spring possesses the means

sufficient for the maintenance of only one of them then father shall be preferred. But according to the *Hadith* given below, preference shall be given to the mother. This rule is clearly ascertainable from the phraseology of the text.

An individual asked the Apostle: O, Apostle of *Allah* who deserves my liberality more. He said your mother. He was asked thereafter who? He said your mother. He was asked again thereafter who? He repeated your mother. Thereafter he was asked the same question once more. He said your father.[6]

The Rule of Textual Phraseology takes Precedence over that of Textual Pre-Requisite

The rule of textual phraseology takes precedence over that of textual pre-requisite. It may be recollected that according to the *Hadith* the sin for acts done either negligently or because of forgetfulness has been removed from amongst the Muslims. According to this rule no one should be penalized for killing another in such a state of mind. But according to phraseology of the following verse, a penalty will be imposed even in such a case. The verse is as follows prescribed:

O ye who believe!
The Law of Equality
Is prescribed to you
In cases of murder:
The free for the free,
The slave for the slave,
The woman for the woman. (2:178)

However the verse given below, according to the rule of the connotation of the text does not prescribe requital (Qiṣaṣ) for murder.

Never should a believer
Kill a Believer; but
(If it so happens) by mistake,
(Compensation is due):
If one (so) kills a Believer,

It is ordained that he
Should free a believing slave,
And pay compensation
To the deceased's family. (4:92)

Likewise, according to the said *Hadith* and the rule of textual pre-requisite, a person who forgets to perform the prayers should not be required to repeat it. But according to phraseology of the following *Hadith* the rule of repetition is proved. The *Hadith* is that: If a person either forgets to perform prayers or falls asleep, then when he realises his mistake, he should perform the prayers.

Implication of the Substance of the Text (Naṣ ke Mafhūm ki Dalālat)

There are two facets of the rule of the substance of the text, i.e., negative import and positive import. An order is taken to be justified by the substance of the text where the positive import supports it for example, it is provided in the *Qur-ān* that:

And that ye be kind
To parents.....
Say not to them a word
Of contempt, nor repel them. (17:23)

This verse prohibits the causing of least pain to the parents. Therefore, according to the rule of positive import all those things whether small or big which cause them pain shall be taken to be prohibited.

Another verse provides that:

Those who unjustly
Eat up the property
Of Orphans, eat up
A fire into their own
Bodies: they will soon
Be enduring a blazing fire! (4:10)

This verse clearly prohibits misappropriation of wealth belonging to the orphans and therefore according to the rule of positive import all such actions will be treated as prohibited which in any way cause some loss to the property belonging to the orphans.

The Rule of Positive Substance [Mafhūm-Muaphiq]

The rule of positive substance is also known as implication of the text (Dalalatulnas). It is also known as patent analogy (Qayas-e-Jaly). It is known as the former because though it is not derived from the phraseology of the text but the order is understood with reference to its literal meaning. It is called patent analogy on the ground that relatively speaking the effective cause is utilized for the determination thereof. It proves the other order on account of the common effective cause. This effective cause is so patent that drawing of an inference is not at all required. Because of this reason the Shwaphi' consider the rule of positive substance equal in validity to the rule of textual phraseology and prefer it over the rule of textual connotation. The following verse of the *Qur-ān* provides for compensation by way of repentance in case of killing by mistake:

Never should a believer
Kill a believer; but
(If it so happens) by mistake,
(Compensation is due)
If one (so) kills a believer,
It is ordained that he
Should free a believing slave. (4:92)

When the payment of compensation by way of expiation is prescribed for a killing by mistake then according to the reasoning of the text compensation shall be mandatory in the case of murder. But *Ahnāf* give preference to the connotation of the text over implication of the text and hence according to them compensation is not prescribed for murder. This is so because viewed from the angle of the connotation of the text, the verse relating to murder provides for punishment in the hereafter only. This rule shall be preferred to the rule of the reasoning of

the text. But textual phraseology shall take precedence over connotation of the text as has already been explained in the context of the penalty in this world. If the reasoning of the text could be constituted for the textual phraseology then the reasoning of the text would have been preferred.

The Rule of Negative Substance [Mafhūm-Mukhāliph]

The rule of negative substance is used where a proved order is qualified. Where no such qualification exists then an order opposed to the original order is proved. Such an order is treated as one proved by the rule of negative substance. For relying upon negative substance rule, two conditions must be fulfilled:[7]

1. The restriction which qualifies a statement should be only for purposes of proof and it should not be for any other reason. For example, creation of hatred or fear etc. As is the case in the following verse:

   O ye who believe!
   Devour not usury
   The doubled and multiplied;
   But fear God; that
   Ye may (really) prosper. (3:130)

   In this verse the words 'doubled and multiplied' are used to create hatred for usury. Any increase over the principal sum shall be treated as usury. This is clearly provided by the following verse:

   O ye who believe!
   Fear God, and give up
   What remains of your demand
   For usury, if ye are
   Indeed believers. (2:278)

2. There should not exist a strong reason opposed to the negative substance, for example:

   In case of murder:
   The free for the free

The slave for the slave
The woman for the woman. (2:178)

Here negative substance proves that the woman should not be killed for man. But another verse clarifies the position that one may be killed for another:

Life for life. (5:48)

The Difference of Opinion of the Leaders of Interpreters Relating to Reasoning by Negative Substance

Ahn-āph do not accept reasoning through negative substance in case of the *Qur-ān* and *Hadith.* But *Shwaphi'*, *Maliki* and *Hanabila* use negative substance in their reasoning. This difference of opinion affects many rulings. For example:

And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver. (65:6)

This verse speaks about the maintenance of a pregnant wife during the waiting period. Here pregnancy is the condition for maintenance. Thus, a woman, who is not pregnant, shall receive no maintenance during the waiting period if the rule of negative substance is applied. Except *Ahnāph* other *Imams* follow this rule. *Imam Abu Hanipha* does not agree and according to him the husband will look after such a wife during the waiting period.

The Apostle of *Allah* has observed:

A married girl had a better right to take a decision about herself as compared to her guardian.[8]

Negative substance proves that in the case of a virgin a guardian has a better right to decide about her marriage and hence may marry her without her consent. However, *Imam Abu Hanipha* rejects this reasoning.

This difference of opinion among the leaders of interpretators is confined to *Qur-ān* and *Hadith*. In other matters, *Ahnāph* also use negative substance as a method of reasoning[9] (The matter of negative substance rule is very delicate and its details may be looked up in the books of Islamic law).

Rules Relating to cases where the Order if found in the Text (Shamuliat-Naṣ)

The adhesive text (Meaning and Text cling together) is of two kinds, i.e., with reference to kind and qualities. The former is again sub-divided into particular and general.

Particular sense is defined as each of such words which alone is devised to convey a particular meaning.[10] In case of a particular word, this specially relates to its kind and nature for example, human being, male and Zaid.

General may be defined as each such word which applies to a group of referents. General is further divided into three kinds:

Firstly, a word is treated as general where there exists a mode which removes the possibility of specification, for example, no creature moves on earth who does not receive sustenance from God. (11:6). The word 'move' is general when there is no mode for specification.

Secondly, a general word may be such where there is a mode which permits specification and hence it does not apply to more than one referent, e.g., and for Allah on those people is pilgrimage who possess the means to do so. The word 'people' is general and the words 'where one has the means' clearly show that the rule does not apply to people generally, but is confined to those persons who can afford it. There is no difference of opinion among the jurists about these two kinds of general words.

Thirdly, a general word may be such where there is no mode either to prove specification or general applicability. In case

of such a general word, there is a difference of opinion among various jurists (Imams) which is as follows:

According to *Shaphi'y*, *Maliki* and *Imam Ahmad* such a general word applies to more than one referent but its reasoning is only probable. In case of each general word there exists a possibility that it may not apply to some of the members (referents) of the group. For this reason a general word is emphasized by the word 'all' or 'aggregate' etc. The well-known principle is that there is no general word where some members are not specified. *Imam Abu Hanipha* is of the view that the reasoning of a general word is definite to the members of the group. There is no possibility of specification in such a case. However, where on the basis of some argument certain members are excluded then its reasoning for the rest of the members becomes probable. The possibility of exclusion of some members exists in such cases.

The effect of this difference of opinion manifests itself in two important ways, which in turn has created differences relating to some detailed rules, e.g., whether the specification of a general word is permitted through analogy or a single narration? Where there is a conflict in case of a rule proved by a general word and by a specific word than whether such a conflict will be acceptable or not?

Before explaining these two rules it is necessary to understand technical expressions.

Final Order: It means an order which is justified by the *Qur-ān* or *Sunnah* uninterruptedly followed (Mutawãtir) and *Sunnah* which is well known (Mushhūra).

Sunnah Uninterrupted [Sunnat-Mutawãtirah]: It is one which is narrated by a large number of persons continuously and therefore it is impossible to assume that it is a false statement.

Well-known Sunnah [Sunnat-Mushhūrah]: It is a narration which is attributable to few persons but has been so widely publicised that it is difficult to assume that so many people could agree to a false statement.

Probable Order [Hukum-Zinny]: It is an order which is substantiated by analogy or by a single narration.

Single Narration [Khabar-Wahid]: It means a narration which is reported by one or a few persons but does not possess the authenticity of the same scale as that of 'Uninterrupted' or 'Well-known' Sunnah.

Analogy [Qayas]: It means the resolution of new problems on the basis of effective cause and precedents.

Repeal [Naskh]: It denotes an attempt to show that certain referents which were covered by an order previously were no more within its scope.

Details Relating to the Question whether a General word can be Qualified or its perfect Specified on the Basis of a Single Narration and Analogy

According to *Ahnaph*, the reasoning of 'general' is definite and final. Therefore, its specification by a probable argument is improper because a general which acquires this status from either the *Qur-ān*, uninterrupted *Sunnah* or a well-known *Sunnah* proves an order definitely. If it is taken to be qualified by a single narration or analogy, then it will mean that an inferior rule is given preference over a superior rule. However, in case it has already been specified its reasoning will become probable and the question of preference will not arise. On this basis its specification by a single narration and analogy is valid. For example, it is stated in the *Qur-ān* that:

Let the woman live
(In 'Iddat) in the same
Style as ye live,
According to your means:
Annoy them not, so as
To restrict them. (65 : 6)

This verse lays down the rule that during the period of waiting ('Iddat) a wife will be allowed residence and other necessary

expenses shall be paid by the husband. This verse applies generally to all divorcees who may be observing their waiting period.

The specification of this verse by a single narration attributed to Phatma bint Qais is not correct. The view of Imam Abu Hanipha is supported by the rejection of this narration by Hazrat Umar. He observed that:

> "We will abandon the Book of our Lord
> and the Sunnah of our Prophet for
> a rule narrated by a woman we do
> not know for sure whether she remembered
> it correctly or has forgotten (something)."[11]

According to *Shawaph'* and *Hanabila*, the reasoning of a 'general' is probable therefore specification of a probability by another probability is permissible. In support of their view, they quote the consensus of the Companions. For example, the *Qur-ān* states:

> "Except for these all other
> Are lawful." (4 : 24)

This general order has been qualified by the following *Hadith:*

Do not place a woman in marriage with father's sister and mother's sister.[12]

This qualification of the said verse is permissible according to *Abu Hanipha* also but he gives to this narration the status of a well-known *Sunnah* and does not treat it as a single narration.

The Qur-ān states that:

> God (thus) directs you
> As regards your children
> (Inheritance). (4 : 11)

This general order is qualified by the following Traditions:

1. A murderer does not inherit anything.[13]
2. A Pagan cannot be the heir of a Muslim and a Muslim cannot be an heir of a Pagan.[14]

Malikis' hold the view that the reasoning of the 'general' is only of probable value. They accept the specification of a 'general' by a single narration when it is supported by the practice of the People of Madina. To strengthen their viewpoint, they usually assert that it is the practice of the People of Madina after narrating traditions. Where the view of the people of Madina is different, then they do not accept the specification of a 'general' by a single narration. For instance, a tradition is that: When a dog violates a utensil, then it must be washed seven times including a rubbing by dust.[15]

This tradition is not qualified by the 'general rule' of washing thrice because the People of Madina did not approve this course.

This difference of opinion among the leaders of the interpreters is confined to the probative value of a single narration and does not extend to an uninterrupted narration and a well-known narration, All *Imams* accept such specification. Each of them argues in favour of his view and criticises the arguments of the other *Imams.* A detailed discussion is purposely omitted here.

For further clarification, two examples are discussed below so that it may be possible to appreciate the extent to which such rules extended the sphere of interpretation.

Hanaphi's declare that the meat of an animal slaughtered without reciting the name of God could not be consumed irrespective of the person who slaughtered it. While the Qur-ān contains a general verse which is as follows:

"Do not eat that on which the name of Allah has not been recited. Such eating is sin." (6 : 120)

But they exclude forgetfulness, and ignorance from the ambit of the general order. They do so because according to them this situation is covered by the order of reciting the name of *Allah*. Forgetfulness and ignorance are common and if it was included in the ambit of the verse laying down a general order, then it would have created unnecessary hardship to the people and the *Shari'at* permits such accommodation. Same is the well-known opinion of *Imam Malik* and *Imam Ahmad*. The only difference is this much that according to *Imam Malik* all traditions which are opposed to the general order have been repealed by this verse, but according to *Imam Ahmad*, there does not exist a single established tradition contrary to this general rule. *Shaphi'y* Jurists declare that even where the recitation of the name of *Allah* is intentionally omitted, the meat can be validly eaten. There is a single narration that *Imam Ahmad* held the same view. According to them, the rule for the recitation in the name of *Allah* is not a proved one, because of the existence of the following traditions. *Hazrat 'Aysha* asked the Apostle of *Allah*, that people bring meat and we do not know whether they had recited the name of *Allah*, can we eat it? The Apostle of *Allah* replied, "Eat after reciting the name of *Allah*."[16]

It proves that the recitation of the name of *Allah* is not an essential condition, otherwise, the Prophet would not have permitted its eating in such a suspicious case. The very fact that a person is a Muslim, gives a guarantee of the recitation of the name of *Allah* as is evident from the following tradition:

A Muslim necessarily slaughters in the name of *Allah*, he may or may not recite the same at the time of slaughtering.[17]

Ahnaph's maintain that a person who murders another outside the Holy precinct and then enters it for protection, then he will not be killed according to the law of equality. He will be first ordered to leave the Holy precinct and when outside, the law of equality will take its own course. The Holy *Qur-ān* lays down the general rule that a person who enters into the Holy precinct shall have peace and protection. On the contrary,

Shawaph's and Malikia declare that he will be killed within the Holy precinct. This is so because when a person who commits murder within the Holy precinct can be killed by way of requital. The 'general' is qualified on the ground of the analogy which is based on the following verse:

But fight them not
At the Sacred Mosque,
Unless they (first)
Fight you there,
But if they fight you,
Slay them. (2 : 191)

Details of the Rules in Case of Conflict Between a 'General' and 'Specific' (Taṣadum Khaṣ-'Aam)

According to the majority of interpreters a 'general' is of probable probative value while a 'specific' is definitely reliable. Therefore, there is no question of a conflict between them as the two operate within different spheres. The verse mentioned below lays down a general rule that:

And those who launch
A charge against chaste woman,
And produce not four witnesses
Flog them with eighty stripes:
And reject their evidence
Even after: for such men
Are wicked transgressors;— (24 : 4)

While the following verse lays down the 'specific' rules:

And for those who launch
A charge against their spouses,
And have (in support)
No evidence but their own,—
Their solitary evidence
(Can be received) if they
Bear witness four times
(With an oath) by God

They are solemnly
Telling the truth; (24 : 6)

The first verse shall apply to all persons except the spouses while the second verse exclusively applies to the partners in marriage.

Ahnaph treat 'specific' and 'general' as definitely reliable that is why they concede a conflict between the two. But this conflict will be only within the ambit of the specific. It will not apply to the rest of the referents of the 'general'. This gives rise to a number of different situations. If both 'general' and 'specific' are found in the *Qur-ān* and the date of the revelation is the same, then specific shall qualify the general rule. For example, 'God has prohibited usury,' was revealed together with the rule that 'God has permitted trade.' Likewise the rule, that the person suffering from a disease or a traveller shall keep fast the next day was revealed together with the rule that whoever finds the month of *Ramzan* it is necessary for him to keep the fast. In both these examples, the first statement qualifies the second statement.

Where the general rule was revealed before the specific rule, then the specific rule will over-ride the general rule within its sphere. For example, the verses relating to a false charge of infidelity which have already been mentioned. The first verse is 'general' while the second verse is specific and hence it over-rides the first one so far as the husband and wife are concerned. Thereafter the reasoning of the general about the rest of the referents remains definitely reliable. After such specification its reasoning becomes of probable probative value as regards the rest of the referents or members.

Where the specific was revealed on a date prior to the revelation of the general, then the later will repeal the former, for example, the Apostle permitted the members of the *Amin* Tribe the consumption of the urine of the camel. This permission was specifically for them because of the harmful conditions of air and water in that particular land.[18] Thereafter this permission was revoked by the general rule to keep away from the urine.[19]

Where the date of neither the general rule nor of the specific rule is known, then in such a situation the conflict will be accepted only within the sphere of the specific. To follow either of the two, some reason or justification for preference shall have to be discovered. If such an element is discovered then action will be taken accordingly. Otherwise, till the discovery of the date, the effect will be confined to the sphere of the conflict. For example, a verse of the *Qur-ān* lays down that the waiting period of widows will be four months ten days.[20] The rule is general and no mention is made of the fact of pregnancy. But in another verse of the *Qur-ān* the waiting period of a pregnant woman is till the time she is delivered of the burden.[21]

Thus, the waiting period of a pregnant woman is specified and there is a conflict between the two verses. The date of the revelation is not known. Hazrat Ali preferring the specific verse reconciled the two to find out the maximum period of waiting and laid down the rule. But Hazrat Abdullah-bin-Mas'ood disagreed with his view that the waiting period of both, i.e., of a pregnant and non-pregnant woman as laid down in the Qur-ān shall be considered and the period which is *longer* shall be the waiting period of a woman in a particular case, and held the view that the specific verse was revealed after the general verse, therefore, the rule of the first verse will be repealed in case of a pregnant widow and her waiting period will be till the delivery of the child even if the time is less than four months ten days.

According to *Shawaph'*, *Malikia* and *Hanabila* and *Abu Yusuf* and *Muhammad* the standard of the welfare tax (Zakat) in case of agricultural produce is 5 *maunds* and 10 *seers*. They quote the tradition that no welfare tax is payable in case where the produce may be less than 210 *seers*.[22] This tradition qualifies the tradition which provides that in case of land which is irrigated by rain or spring water or is wet land, the welfare tax will be 1/10 of the produce.[23] In case of a land which is irrigated by well water the welfare tax shall be 1/20th of the produce. In other words, where more labour and expenses are incurred by a farmer, then the welfare tax will be less and where expenses are

lesser and less labour is employed by the farmer the welfare tax will be more.

Imam Abu Hanipha declared that welfare tax is to be paid in respect of agricultural produce notwithstanding its quantity. His reasoning is based on the above tradition which lays a rule of general applicability. As regards the specific tradition, according to him, it relates to grains only which were the subject-matter of trade because the measure (Wasq) was used in the grain trade only[24].

Shawaph', *Malikia* and *Hanabila* hold the view that a Muslim will not be killed for the murder of a protected *Pagan*. Their reasoning is based on the tradition that a Muslim will not be killed for the murder of an unbeliever (according to the law of equality).[25] This tradition qualifies the verse of the *Qur-ān* which is to the effect that: (Law of equality is prescribed for you)

Free for free
Slave for slave
Woman for woman. (2 : 178)

Imam Abu Hanipha has said that a Muslim will be killed for the murder of a protected unbeliever as is clearly laid down in the *Qur-ān* and the tradition actually relates to combatant unbelievers only. Beside a single narration and analogy in case of other specific words which qualify a general, there is not much difference of opinion among the interpreters.

Some Qualifies of an Expression of a General Nature ['Aam Ke Mukhaṣaṣ]

The consensus (*Ijma'*) : Allah has prescribed pilgrimage for those who can afford the expenses.

Logic [*'Aql*]: The people who were informed, that the people of Mecca have collected the war materials. In this verse the word 'people' refers to specific persons.

The usage and habit [*'Urph-'Ādat*]: Mothers ought to suckle

their children for two complete years. Those who by way of usage and custom follow a different period or do not at all suckle their children are not covered by this rule.

The sense of touch [*Ḥis*] ; Wind will uproot everything by the command of the Lord. It is clear that 'everything' includes only those things which are capable of being uprooted.

The Characteristic [*Waṣph*] ; Prohibited to you are daughters of the woman with whom you cohabited. And if you have not cohabited then their daughters are not prohibited.

The condition [*Sharṭ*]: Those from amongst you who do not possess means to marry protected believing woman.

The exception [*Istisna'*]: Trade, where both buyer and seller are present for the conclusion of a transaction. The Qur-ān provides that, 'But if it be a transaction which ye carry out on the spot among yourselves, there is as blame on you, if ye reduce it not to writing.

Therefore, such transactions will be exempted from being reduced to writing.

The extent or limits [*Inteh or Hatta*(*y*)]: Wash your faces and your hands upto your elbows.

The Status of a Qualifier [Mukhsas-Ke-Haisiat]

As a qualifier explains an object, every *Imam* uses it to qualify a general expression. Different names are sometimes used to signify a qualifier, so much so, that general expressions have been qualified by analogy and a single narration. Sometimes for assuming an analogy much straining and stretching has been employed. For the same purpose a single narration is often characterized as a well-known opinion. For instance, *Shawaph'*, *Malikia* and *Hanabila* maintain that in enemy land a person will not be punished for adultery and fornication. The verse of the *Qur-ān* provides:

The woman and the man
Guilty of adultery or fornication,—
Flog each of them
With hundred stripes: (24 : 2)

This verse is unquestionably specific about punishment and general in its applicability. However, *Imam Abu Hanipha* restricts the *Qur-ānic* verse by the following tradition:

The divinely prescribed punishments will not be enforced in an Enemy Land.

This tradition is decidedly very weak and devoid of that probative value which is essential for a qualifier of the Text. But certain narratives are therein which some supportive words exist. On the basis of analogy these supportive words are relied upon to use this tradition as a qualifier. The additional words are: '(because) of apprehension that he may not join the enemy'.[26]

Likewise, the *Qur-ān* prescribes severing of the hand as the punishment for theft. But unless the quantum of the property stolen is determined which is to carry this punishment, it will be difficult to act upon this *verse*. A single narration lays down such quantum and hence removed this difficulty. Every *Imam* has qualified the *Qur-ān* by a single narration and *Imam Abu Hanipha* uses the device of calling such a single narration as a well-known opinion.

The Reasoning or Implication of the Specific [Khāṣ Ki Dalālat]

Jurists agree that an expression conveying specific meaning conclusively proves its object and the difference of opinion is confined to the question whether further explanation is permitted or not. *Imam Abu Hanipha* maintains that a specific expression is self-explanatory, and it does not admit further explanation. If such explanation is admitted, its value will not be of an explanation but of a 'repeal' which will over-ride the implementation of a *Qur-ānic* verse. However a 'repealing text' must be of a higher or at least of an equal rank as compared to the

'repealed text'. Therefore, they do not accept traditions for the explanation of a conclusive specific expression. They also reject its repeal by a single narration.

According to *Shawaph'* and some others, though a specific expression conclusively proves its objective, it does admit the possibility of an explanation. According to them, the status of a specific expression is like that of a brief expression (*Mujmal*), which could be explained by weak traditions. The Book states that:

> And bow down your heads
> With those who bow down. (2 : 43)

Here the word 'bow down' is a specific expression and a part of the prayer and its omission amounts to no prayer. But the Prophet asked an Arab to repeat the prayer when he did not bow down properly with patience.[27]

Aḥnaph do not consider bowing down with patience as a condition prescribed for the proper rendering of a prayer. Although, the Apostle of *Allah* ordered the Arab to repeat the prayer for such an omission, it is an evidence of the fact that for a proper prayer bowing down patiently is compulsory. But if this proposition is accepted, then a single narration will repeal a *Qur-ānic* verse. While in fact a single narration does not possess the probative value of repealing a *Qur-ānic* verse. A single narration actually possesses only probable probative value. So viewed *Qur-ān* and Traditions shall operate within their respective spheres.

Shawaph' and some others maintain that a specific expression admits explanation, hence in the *Verse* bowing down is a brief expression which could be explained by a single narration and proper and patient bowing down is an indispensable part of the prayers, in the absence of which the prayer will not be valid.

At another place, the *Message* requires that: 'and they should circumambulate the Sacred Precinct.' (22 : 29)

Aḥnaph treat the word circumambulation as specific expression and it does not convey that washing is necessary before such circumambulation. But the Prophet has directed that 'Remember! no one should circumambulate the Holy Precinct without washing or when naked.'[28]

This tradition if taken to prescribe ablution, then the Qur-ānic rule will be repealed which is not possible on the basis of a single narration. For this reason *Qur-ānic* principles will remain intact and this tradition will simply provide circumambulation. According to Shawaph' ablution will be treated as prescribed and a part of the *verse*.[29]

Common Characteristics: (Shamuliat-e-Ausaf)

It means an order (operational rule of conduct) which is proved by the reasoning based on a word/words according to the characteristics of the subject-matter it/they expresses. The word/words may be either definite or qualified.

A defined word/words apply generally to all referents or matters covered by it according to the characteristics relating to kind or nature of the subject-matter.[30]

A qualified word/words apply either specifically or generally to a referent or a matter covered by it according to some additional characteristic instead of the kind or nature of the subject-matter.

In case of a definite word/words only those qualities are relevant which relate to the kind, while in case of a qualified word/words some additional characteristic is decisive. Additional characteristics include a characteristic, condition, stipulation, purpose or some other qualifying factor. The definite word/words do not admit any of these factors and exclusively express the kind or nature of the subject-matter. For example, the Qur-ān states:

'A slave is to be granted freedom.' (58 :3)

At another place it states that:

'A believing slave is to be granted freedom.' (4 : 92)

In the first illustration 'slave' is a definite word and no other condition is attached to it. Hence, only those qualities will be treated as relevant which are found in a person because of slavery. In the second illustration, the word 'slave' is qualified by the characteristic that he should be a 'believer' also. Here 'believer' (Momin) is a characteristic which is an additional quality which is not covered by the 'kind', i.e., slave, to which the first rule applies.

Where the Definite and Qualified words are found in different rules of conduct then both will be binding in action in their respective spheres. But where both types of words are found in a single rule of conduct then FIVE different situations arise and there is no difference of opinion about three of them.

Three Rules: Where There is Agreement Amongst the Jurists

(I) Where a word is Definite at one place and the same word is Qualified at another place and the rule of conduct as well as the effective cause is the same, then in such a situation Definite will be taken to mean Qualified e.g.,

He hath only forbidden to you
Dead meat (carrion) and blood
And the flesh of swine.
And that on which
Another name hath been invoked
Besides that of God. (2 : 173)

In this verse the word 'blood' is Definite and no qualitative condition is attached to it. It is stated at another place that:

Say: "I find not
In any message received.
By me by inspiration
Any (meat) forbidden

To be eaten by one
Who wishes to eat it,
Unless it be dead meat,
Or blood poured forth,
Or the flesh of swine, (6 : 145)

In this verse the word 'blood' is qualified by the words 'poured forth'.

Both the verses lay down prohibitions and the effective cause is the same i.e., the harmful nature of the blood. Blood poured forth signifies the liquid state of blood the consumption of which is harmful for the health of a person.

(II) A word may be Definite at one place and the same word may be Qualified at another place but the rule of conduct and the reason thereof are different then Definite will not be treated as Qualified and both will be acted upon in their respective spheres. For instance, Sura *Alma'ida*, verse 41 lays down that:

As to the thief,
Male or female,
Cut off his or her hands:
A punishment by way
Of example, from God,
For their crime:
And God is Exalted in Power. (5 : 41)

In this verse the word 'hands' is unqualified and definite. It is stated at another place that:

O Ye who believe:
When ye prepare
For prayer, wash
Your faces, and your hands
(And arms) to the elbows ; (5 : 7)

In this rule the words 'to the elbows' qualify the order for washing the hands.

In case of these two verses the rules of conduct are different and the reasons thereof are also different. Hence the question of treating 'Definite' as 'Qualified' does not arise. Where a single word is 'Definite' and 'Qualified' at two different places but the rules of conduct so laid down are different although the effective cause is the same, then, in such a situation, a definite word is not to be treated as qualified and both will separately operate within their respective areas of operation e.g.,

'Wash your faces and hands to the elbows.' (5 : 7)
Here the word 'hands' is subjected to the condition of 'to the elbows'.

At another place it is prescribed that:

'Purify your faces and hands with clear dust or earth.' (5 : 7)

Here the word 'hands' is definite.

The rule of behaviour enjoined is different in the two cases but the effective cause is the same. Therefore, the definite word will not be taken as a qualified word.

The Two Situations : Where a Difference of Opinion Exists

(I) Where a word is Definite at one place and the same word is Qualified at another place, but the rule of conduct is the same although the reason thereof is different. In such a case there exists a difference of opinion amongst the jurists e.g., in case of Zihar, the expiration is:

'Should free a slave.' (58 : 3)

Here the word 'slave' is Definite.

At another place it is declared that:

'Should free a believing slave'. (4 : 92)

Here the qualification is that the slave should be a believer.

The order in both the cases is same, but the reasons are different, as the first verse applies to cases of Zihar (where inequitous words are said about a wife) while the latter applies to the cases of death caused by mistake. Imam Abu Hanipha maintains that definite will not be treated as qualified and in case of Definite the slave might be a believer or unbeliever. On the contrary, according to the majority, definite will be treated as Qualified. Hence in both the cases a Muslim slave had to be granted his freedom. (The arguments for the two different views may be looked up in the Books on Islamic law).

(II) Where a word is definite in one context and the same word is qualified in another context but this difference is not in the application of the rule of conduct but the effective causes are different, then in such a case the Doctors of Law (Jurists) take different positions. For instance, there is a Tradition which relates to alms-giving (ṣadqa-e-fiṭr) on the occasion of the two festivals ('Eidain):

> Slave, Free, Men, Women, Elder or Minor
> Who are muslims are under a duty to give
> Compulsory charity (on the occasion of
> the two festivals (Eidain) known as a
> Ṣadqa-e-fiṭr.[31]

The Hadith confines the operation of the rule to the Muslims only. Another Tradition provides that:

> Every slave, free, man, woman, elder
> or minor is under a duty to give
> compulsory charity on the occasion of
> Eid Festival."[32]

The rule of conduct is the same but reason thereof in spite of being one is qualified in the former tradition by the word Muslims, while in the second tradition there is no such condition. Therefore, the Shawaph', Malikia and Hanabila treat Definite as qualified. They also hold the view that a non-muslim also carries an obligation to give compulsory charity. Abu Hanipha does not treat definite as qualified and instead keeps

the two valid within the respective spheres and holds the view that a non-muslim is under an obligation to give compulsory charity in view of the second Hadith.[33] Even among Ahnaph there exist some examples where a Definite has been treated as Qualified. e.g., in one Tradition the matter of welfare tax (zakat) on camels is dealt with and the word 'camel' is Definite.[34] In the second tradition the word 'camel' is qualified by the word 'grazing camels'.[35] Aḥnaph assert that welfare tax is payable on camels grazed in the forest and other camels are exempt, and thus treat a Definite as Qualified, however, their argument is that Definite is repealed by the Qualified. But for the validity of this argument it is necessary that Definite must precede the Qualified.

The Laws and Rules for the Comprehension of the Texts (Qur-ān & Hadith)

Proper comprehension of the Text requires a consideration of the words and the modes of addresses. The comprehension of the text is achieved in two ways, (i) Elucidation of the order of the text, and (ii) the proof thereof on the basis of phraseology.

Elucidation of the rule of conduct (order) may take different forms of unequal probative value i.e., where the order is (patent-Ziḥar); Text (Nass), Self-explanatory (Mufassar), and Abstract or Brief (Mujmal).

Plain [Zahir]

Plain means a statement where the rule of conduct is manifest and no mode is required to understand it. But the order is not the referent of such words and the referent is some other order and there is also a possibility of repeal and argumentation (Ta'vīl) e.g.,

'*Allah* permitted trade but prohibited Usury.' (2 : 275)

The rule is quite plain but this statement in fact shows the distinction which is drawn between Trade and Usury and the

referent of these words is not the prohibition or permission of Usury and Trade.

Likewise, the *Qur-ān* lays down that

...So take what the Apostle
Assigns to you, and deny
Yourselves that which he
Withholds from you....(59 : 7)

This verse was revealed when the question of distribution of wealth which fell into the hands of Muslims as a result of a campaign against the Jews where active fighting did not take place, had to be resolved.

Thus, the referent is the wealth acquired without fighting. However, the verse also lays down a general rule of obedience to the orders of the Prophet besides providing a rule of conduct for similar situations in future.

Plain texts are binding in action (Wājib) except where there exists an argument to the contary, in which case argumentation or repeal will be necessary.

An argumentation (Ta'vīl) is defined as:

An explanation whereby a different interpretation of an obvious meaning of a word is given.'

There are *three* conditions for an interpretation:

1. There exists a possibility of an explanation in the word as in the case of 'plain'.

2. The need for such an explanation must exist i.e., the rule which is derived according to the plain meaning of a text should be contrary to some established principle of Islamic law or a stronger argument contrary to the plain meaning is available, and

3. The explanation is supported by an authority or an argument.

Different Kinds of Argumentation (Ta'vīl)

There are a number of ways of such reasoning e.g., specification of a 'General' and Qualification of a 'Definite'.

Specification of the General : Allah has permitted buying and selling transactions or trade, is a general rule but it has been subjected to various restrictions in as-much-as certain kinds of trade transactions are prohibited on the basis of some verses and traditions e.g., where mutual consent was missing or where a trade transaction was fraudulent or amounted to cheating.

Definite Qualified : As pointed out earlier the word 'blood' is used in the definite sense in one verse while in the second it is qualified by the words 'poured forth'. Repeal (by which a rule of action is completely replaced by another) applied only during the life time of the Prophet. (A detailed discussion is undertaken separately under the heading 'Repeal' in the following pages).

The Opposite of Plain is Latent (Zahir-Khafi)

A plain expression is one where the order is quite plain but its application to certain referents is implied.[36] For example, the rule is that the hands of a thief be severed.[37] This rule is quite clear and there is nothing implied or latent therein. But the rule also applies to pick-pockets and shroud stealers impliedly, because the nature of the act (stealing) is common.

To remove the Latent an interpretative effort is needed. An interpreter considers the effective cause of the order and the wisdom thereof and decides whether an implied situation will be governed by the general order or not? In such cases, the possibility of a difference of opinion is quite high. Every inter-

preter decides the matter according to his own point of view. Some explanation or reasoning supports each of such point of views.

Text (Nass)

Text is that order which may be understood on the basis of words and the existence of a particular mode of expression is not necessary. The referent of the word is solely that order, but it is susceptible to both an argumentation and repeal[38] e.g., the distinction between usury and trade is definite and one does not resemble the other. The scheme of the distribution of wealth which falls into the hands of Muslims as a result of a just war (where actual fighting did not take place) is a text. The applicability of the Text and Plain is definite and they are both binding in action though Text admits both an Argumentation and Repeal.

The Opposite of Text is Loose (Terms) (Naṣ-Mushkil)

The opposite of Text is 'loose' and to understand an order on the basis of a loose term the mode of expression is to be considered although the object of the word is the same order. As in a Latent there exists some implied meaning in case of Loose Terms also. But in case of Latent the implied meaning does not exist in the nature of the term and it is due to some external cause. However, in case of loose Terms the implied meaning exists in the very nature of the word e.g., a compound word does not refer to some specific meaning, then in such a situation to infer some specific meaning therefrom some external mode will be necessary. For instance the Arabic word 'Quruon' is a compound word which means both menstrual course of women and their period of purity. In the Grand *Qur-ān* the waiting period of a divorced woman has been expressed by the aforementioned Arabic term as 'three Quru'. 'Quruon' is the plural of the word 'Quru'. Imam Abu Hanipha on the basis of the mode of expression takes it to mean menstrual courses according to which the waiting period of a divorcee is inferred as three menstrual courses. On the other hand Imam Shaph'y on the basis of the mode of expression holds the

view that it refers to the period of purity and declared that the waiting period of a divorcee shall be three periods of purity. The relevant *Qur-ānic* rule is expressed in the following manner:

Divorced women
Shall wait concerning themselves
For three monthly periods. (Thalāthat Quru). (2 : 228)

Difference Between the Definition of Text and Plain (Naṣ-Zihar)

There exists a difference of opinion among the various Doctors of Law about the definition of a 'Plain' expression and Text. Shawaph', Malikia and Hanabila jurists often do not draw any distinction between the two. But some of the Shawaph' and Malikia draw a distinction between the two. According to them Text is that which for its implication does not admit Argumentation and Repeal, and Plain is one which does so.

Again, some Malikia Jurists have explained that such a possibility (of Argumentation and Repeal) must have arisen from some argument. Application of such a nature produced otherwise than by an argument will be invalid. Thus the implication of a general word i.e., general applicability will be treated as Plain because there is a possibility of specification in such a case although this possibility does not arise from an argument. While in the first case a general word will be treated as Text because the apprehension of argumentation and repeal does not arise from an argument.[39]

Self-Explanatory (Mufasser) Terms

Self-Explanatory term means one, whereby the order or rule of conduct is so plainly clear that no further elucidation or clarification is needed and there is no apprehension or possibility of any further argumentation (Ta'vīl),[40] for instance,

The woman and man
Guilty of adultery or fornication,

Flog each of them
With hundred stripes: (24 : 2)

And those who launch
A charge against chaste woman,
And produce not four witnesses
(To support their allegations),
Flog them with eighty stripes; (24 : 4)

It is evident that in case of figures neither clarification nor a chance of an addition or substraction exists. For certain specified crimes punishment is prescribed and they are all of this type. Similarly, some words have not been explained in the Holy *Qur-ān*, but the Prophet explained and provided particulars about them either by deed or words. All of them shall be treated as Self-explanatory e.g., prayers, welfare tax and pilgrimage, have neither been defined nor particulars about them are found in the Book but the same were provided by the Prophet.

Self-explanatory orders or rules of conduct are binding in action and there is no possibility of attributing some other meaning than what is obvious, although the possibility of repeal remains in case of such orders. As compared to Plain and Text the implication of a Self-explanatory is more reliable.

The weighty nature of the implication of Self-explanatory is the cause for the absence of specification and argumentation in such a case. Such probative value does not exist even in case of the Text and Plain e.g.,

Then we bade the Angels
Bow down to Adam, and they
Bowed down, not so Iblīs :
He refused to be of those
Who bow down. (7 : 11)

In this verse the word 'Bowed down' is Plain with reference to the Angels and is Text as regards Hazrat Adam. But there

is room for specification (Takhṣiṣ) i.e., some Angels might not have bowed down while some others did so, or the word 'Angels' may be such a General which might have been taken as qualified to refer to some particular Angels. In this sense there is room for explanation i.e. whether the Angels bowed down individually or collectively? But the words 'they bowed down' and 'those who bowed down' clearly excluded any such possibility of specification and hence this statement acquired the status of self-explanatory. An example of Self-explanatory terms in Islamic law is this verse:

...fight the Pagans
All together as they
Fight you all together....(9 : 36)

Here the word 'all' has removed all chances of Specification and Argumentation, but the chances of Repeal exist.

Distinction Between Explanation and Argumentation (Tafsīr and Ta'vīl)

It may be specifically noted that elucidation of the Self-explanatory which totally displaces argumentation is that which is provided either by Allah or the Prophet. An elucidation of the jurists does not exclude argumentation (Ta'vīl) because it is mere interpretation. Interpretation does not possess that rank which is enjoyed by the explanations emanating from the Creator or His Messenger.

According to the jurists, there is a difference between Explanation and the Argumentation which deserves notice. Commentary or Explanation denotes an elucidation on the basis of the obvious meaning of the words and the object is fixed by deep thought and reflection. While argumentation denotes the employment of some valid argument by which a meaning which is plain is rejected and is replaced by another.

The Opposite of Self-Explanatory is Abstract (Mufassar and Mujmal)

Abstract (or brief) term is one where neither the order is clear nor there is any mode of expression by which it may be properly understood. In this category fall all those words where there is a difference between the literal meaning and technical meaning, e.g., prayer (Salāt), the literal meaning is 'asking *Allah* for a favour' (Du'a) while the technical meaning is 'Prayers' ('Ibādat). The word 'Zakāt' literally means 'an increase' or 'growing' but it technically means welfare tax which is an obligatory duty imposed on Muslims possessing wealth to the extent of the minimum prescribed limit. An abstract term is also one which conveys a number of meanings and as there exists no argument for preferring one such meaning over another and it is not possible to determine its purpose or object in the absence of an explanation.

Example : The word 'Ain' ('in) means an eye, sun etc. and in the absence of an argument to the contrary it cannot be taken to refer to a particular meaning. For treating it as Specific an indepth evaluation and discussion is necessary.

A word may not be a compound word but whenever it is used so rarely that it is not possible to determine its referent without clarification then it will be treated as an abstract term (brief).

Example: The word (Hul') which means greedy and impatient, for instance:

Truly was man created very impatient; (70: 19)

The explanation of this word is found in the two verses mentioned below:

'Fretful when evil
Touches him,' (70 : 20)

'And niggardly when
Good reaches him,' (70 : 21)

Abstract-Implied (Mujmal-Khephā)

Abstract (brief) terms contain more implied meanings as compared to the Loose and Latent (Khaphi) terms in THREE cases:

a) Where a number of meanings could be inferred and there is no mode to find out a particular meaning;

b) The law uses the word in the technical sense while the literal meaning is different; and

c) It is a strange word which is not used generally.[41]

In all these cases the object or referent cannot be fixed without some explanation and clarification.

Fortified (Muhkam) (strong, firm, strengthened)

It is a term which signifies an order to patently (clear) that it does not admit any explanation (Ta'vīl), specification, substitution or change. It includes all the fundamental principles of religion and law, such as those relating to faith, prayer, marriage etc. It also includes all such orders where it is clearly declared that they shall be applicable always, for instance, in the case of a false charge of lewedness against women where the person making such allegation fails to establish four witnesses, it is clearly laid down that their testimony is not to be accepted in future. The relevant verse is in the following words:

> And reject their evidence
> Even after: for such men
> Are wicked transgressors
> Unless they repent thereafter
> And mend (their conduct),
> For God is Oft. Forgiving,
> Most Merciful. (24 : 4 & 5)

Further Prophet declared that:

> Fighting shall continue as prescribed from the date when *Allah* appointed me as the Messenger till in the end my followers fight against Dajjal.[42]

The difference between Self-Explanatory and Fortified is that in case of Self-Explanatory the possibility of Repeal exists while in case of the latter no such chance exists. The possibility of Repeal in case of Self-Explanatory is confined to the time of the Revelation. Therefore, Self-Explanatory acquired the status of the FORTIFIED because the period of Repeal expired. For this reason two kinds of Fortified are admitted by the jurists i.e., Fortified *per se* and Secondary Fortified.

Fortified per se (Muhkam-e-Zāt) : It ousts repeal by its very nature or kind (as explained earlier with the help of illustrations).

Secondary Fortified (Muhkam-e-Nai'rah): It acquires the status of Fortified *per se* by the expiry of the period of *Qur-ānic* revelation as the chance of Repeal ended after such time.

So viewed, the Grand *Qur-ān* after its completion acquired the status of Fortified *per se* (definitely reliable) because the possibility of repeal which may bring changes of kind (Zāt) no more existed.[43]

Fortified is binding in action and the question of argumentation and change does not arise. The opposite of Fortified is Allegorical (Mutashabih) which neither elucidates the purpose of the order nor there exists any mode which may help in its comprehension. (But the precepts of Shari'ah (Law) are free from the 'allegorical', therefore a detailed discussion is not undertaken here).

The preceding discussion of Plain (Zahir), Text (Naṣṣ), Self-Explanatory (Mufassar) and Fortified (Muhkam) shows that so far as the question of reliability is concerned all of them do not stand on the same footing. This difference comes into prominence in case of a conflict. Where the Text and Patent oppose

each other then the former prevails. For example, the Holy Qur-ān provides that,

> Except for these, all others are lawful...(4 : 23)

This verse does not mention the number of wives which a Muslim may marry because it explains the class of women with whom marriage is prohibited. Another verse lays down that:

> If ye fear that ye shall not
> Be able to deal justly
> With orphans,
> Marry women of your choice,
> Two, or three, or four; (4 : 3)

This verse dealing with the problem of orphans permits Muslims to have upto four wives at one and the same time subject to the condition of just dealing. This verse is 'Text' in the matter of the limit of four wives and as the Text takes precedence over Plain the rule laid down therein shall prevail.

Likewise, in case of a conflict between Text and Self-Explanatory the latter shall take precedence over the former e.g., the Prophet directed that a woman who bleeds beside menstrual courses should wash (ablution) herself before each prayer.[44] This Tradition is Text so far as ablution before every prayer is concerned but there is a doubt about the exact rule in as-much-as it is not clear whether ablution is mandatory before every set of prayers or every single prayer (Rak'at). However, another Tradition has removed all doubt about this matter and is to the effect that:

> "Such a woman should perform ablution before every prayer."[45]

This Tradition is Self-Explanatory as it clearly lays down that ablution is obligatory before a set of prayers once only. This is also the view of Imam Abu Hanipha who declared that one ablution was enough to perform a set of prayers at one time.

Some Technical Terms Used in the Elucidation of an Order (Rule of Conduct)

Some of the technical terms used in the elucidation or classification of a precept used by the leaders of the interpreters are as follows:

a) Compound and TERM PRIMA (Mushtarak and Muawwal)

b) Proper and Assumed (Haqiqi-Majāzi)

c) Positive and Elusive Terms (Ṣarih and Kanaya)

Compound Word [Mushtarak]

Compound words are those which carry more than one meaning and for every meaning it is coined separately.[46] Such characteristics are attached to a compound word for three principal reasons e.g., the word 'period' (Quru) means two different things (period of menses and period of purity) and the word 'hand' (Yed) palm, hand, shoulder etc. Sometimes different meanings are attached to a single word by persons belonging to different tribes e.g., the word 'Hand' is used to signify 'palm' and also the 'hand' and 'shoulder' both. Thus the dictionary meanings are also multiple and the word 'Hand' is treated as a compound word. Secondly, a word might have been designed originally to convey a particular meaning but has come to acquire an assumed meaning. The word 'Sa'' means a wooden receptacle used to measure grains but it is also taken to mean all those things which could be placed therein. Finally, a word may have a particular dictionary meaning but may mean a different thing altogether when used technically in the field of law (Shari'ah). The word prayer (Salāt) was coined to mean 'asking a favour from *Allah*', but in the Shari'ah it refers to a particular type of religious ritual. Likewise, the word 'Divorce' (Talāq) was coined to mean every kind of 'release' but is technically used for separation of spouses only.

The difference between General and Compound words is that in case of General word it is one which was originally

designed to convey a number of meanings while in case of Compound word it is used for different meanings and is designed to mean a particular thing in a particular context. A General word conveys more than one meaning at one and the same time while a compound word ordinarily conveys only a particular meaning at any one time. In some situations such a word may imply more than one thing at any one time but such words are rare and there is also a difference of opinion among Doctors of Law about such words. Therefore, this respect is not very significant for the purposes of interpretation.

Where a compound word carries both technical and literal meanings together, then the technical sense shall be preferred e.g., the words prayers and divorce. Where the conjunction of meanings is in the literal sense then interpretative effort will be necessary to establish one meaning on the basis of mode of expression and other indications. There does arise a possibility of difference of views in the fixation of relevant meaning of such words used in a particular context, e.g., the word 'period' is taken to mean menses as well as a period of purity when used in an order relating to women.

Where there is no mode of expression available for finding out the relevant meaning of a compound word then there are three opinions of the Doctors of Law (Jurists) which play an effective role in the fixation of a particular meaning of such words. They are:

1. A compound word may be interpreted to mean more than one thing provided there is no difficulty in understanding the substance and import of the statement, whether it is in the positive or negative form. Many Shawaph' accept this view;

2. Only one meaning should be assigned to a compound word irrespective of the fact whether the statement is positive or negative. This is the accepted view of the Ahnaph; and

3. More than one meaning may be validly assigned to a compound word provided the statement is in the negative form. Some of the Ahnaph prefer this view.[47]

This difference of opinion comes to the force when some legal precepts are under consideration for the fixation of meanings thereof. For instance, the Message says that:

> "The heir of a murdered person is given power and right by Us. Therefore, he should not transgress the limits in the matter of murder." (17 : 33)

In this verse the Arabic word 'Sultan' has been used which means 'Power' and 'Right' which may signify requital (Qiṣaṣ) as well as compensation (Blood money) in cases of murder. Shawaf' accept conjunction of meanings as a valid concept. Therefore, according to them, an heir (other legal representative) of the person who has been murdered may in his discretion either accept compensation or demand the operation of the law of equality (Qisas), or may forgive and release the killer from all liability without accepting any compensation.[48] This principle finds clear support in the Tradition:

> '(That) whoever kills any person hereafter, then, the heirs shall have the twin rights of either accepting the compensation or demanding the death of the murderer.'[49]

However, some Ahnaph do not accept conjunction of meanings and treat requital and compensation as distinct and separate. Hence an heir or other legal representative shall have no discretion to demand either of the two. They consider only requital as binding in action. The *Hedaya* declares that:

> 'Requital (Qiṣaṣ) is decidedly binding in action and an heir cannot validly accept compensation without the consent of the murderer.'[50]

Support is sought for this view from the undermentioned verse 178, Sura *Baqara*, II:

> O Ye who believe!
> The law of Equality
> Is prescribed for you
> In cases of Murder:

The free for the free,
The slave for the slave,
The woman for woman.
But if any remission
Is made by the brother
Of the slain, then grant
Any reasonable demand,
And compensate him
With handsome gratitude
This is a concession
And a mercy
From your Lord.
After this whoever
Exceeds the limits
Shall be in grave penalty. (2 : 178)

Ahnaf maintain that this verse supports the view that 'only requital' is provided for and is 'binding in action'.

Further, the word 'My Lord' (Maula) expresses a number of meanings as it is used to mean a freed slave, a person who granted freedom, owner and master. If a person utters the word Lord (Maula) and stops without specifying anyone, and if by chance both the persons who granted him freedom and the freed slave are present then according to Shawaph' the wealth will be distributed between both of them as they accept conjunction of meaning as a valid rule of interpretation. Ahnaph declare that the wealth will be given or utilised for the benefit of the freed slave, he being more deserving. (This example is just for illustrating this point and these rulings are of no value today).

Term Prima (Muawwal)
(The rule of preferred meaning)

The opposite of compound word is the Preferred Meaning which may be called Term Prima because when one meaning of a compound word is given preference over all others then it becomes Muawwal or prima-inter-paris.[51] This preference is based upon one of the many relevant factors. Thus, a single narra-

tion, mode of expression, occasion and context in which the word is used are utilised to reach the preferred meaning, and the decision of the qualified interpreter finally decides the matter. Once a compound word assumes the status of Term Prima, it becomes binding in action because of its high probative value which it so acquires. For instance, the word 'Qurun' e.g., *'period'* was given two different 'preferred meanings' by the two groups of interpreters. One group preferred 'menstrual period' while the other 'period of purity'. Thus the word not only became a Term Prima but also acquired the status of a prima donna in both senses.

Proper and Assumed (Original and Technically Assumed) (Haqiqi-Majāzy)

Proper meaning is one for which the word was originally coined and conveys the same, while assumed meanings are those which are different from those for which it was coined, when used technically in the field of law (Shari'ah).[52] For instance, the word Salāt i.e., 'prayer' was originally designed to convey 'asking of a favour from Allah' and thus its proper meaning is Du'a,i.e., 'supplication'. But technically in the context of Law (Shari'ah) it is understood to mean '*Ibadat* i.e., 'prayers'. To treat a proper meaning as assumed there must exist a rational relation between the two senses i.e., original and assumed.

Some Rules Relating to Proper and Assumed Meanings

Where it is appropriate to rely upon the proper meaning then the assumed meaning shall not be preferred. Imam Shaph'y prefers a wide interpretation while Imam Abu Hanipha believes in strict interpretation. For instance

The Grand *Qur-ān* lays down:

And marry not women
Whom your fathers married,
Except what is past:
It was shameful and odious,
An abominable custom indeed. (4 : 22)

According to Imam Shaph'y in this verse the word 'married' refers to the Solemn Covenant which a male and female take as it is a condition precedent to live as a married couple and sex relations become valid. Therefore, according to his point of view if a person commits the sin of fornication with a particular woman his son can validly marry her. On the contrary Imam Abu Hanipha maintains that even fornication will prohibit the sons from marrying women with whom their fathers fornicated. He argues that the verse uses the word Nikah and it is literally means the 'union' therefore, it means 'sexual intercourse', according to the proper meaning rule.

Nikah is the reason of such 'union' according to the assumed meaning rule. Therefore, the proper meaning of Nikah is sexual intercourse while the assumed meaning of 'sexual intercourse' is 'Nikah'.

Proper and assumed meanings both can not be taken as such in case of a single word. But Imam Shaph'y even in this case adopts a liberal attitude. For instance Sura *Ma'ida*, Section 2, Verse 7, lays down that:

Or ye have been
In contact with women (5: 7)

The view of Imam Abu Hanipha about the statement that 'Or Ye have been in contact with women', will mean that ablution will not be necessary in case a person comes into contact with women because the word 'contact' is used in the assumed sense. While Imam Shaph'y maintains that 'contact with women' will necessitate ablution because he accepts conjunction of the proper and assumed meanings of a word. The author explains that the word 'Almastm' is derived from the root 'Malamasta' which means 'touching', and its proper meaning is 'touching by hand' while its assumed meaning is 'sexual intercourse'. Keeping in view the mode and the linguistic usage "come into contact with a woman" and the context where this act is expressly equated with the following, i.e., 'but if you are ill; or on a journey; or one of you cometh from offices of nature"; clearly establish that this statement does not refer to innocent touching

of women by accident or while doing a job and where no sexual urge is the dynamic force behind touching and the like.

Proper Treated as Assumed

When it is difficult to accept the proper meaning of a word or such a usage had been abandoned, then the assumed meaning will be adopted e.g.,

> 'A person takes the oath that he will not eat a date tree. Naturally it will mean that he will not eat the dates. If the tree bears no fruit then it will mean that he will not appropriate the sale proceeds of the tree. Likewise, where a person takes a vow that he will not put his foot in the house of the person named, it will obviously mean that he will not enter his home.'

Secondly, when the proper meaning is still in use but the assumed meaning has come to be accepted widely, then Imam Abu Hanipha prefers the proper meaning e.g., where a person took the oath that he will not eat wheat, then if he eats boiled or roasted wheat his vow will be broken inspite of the fact that these words would ordinarily mean that he will not eat wheat bread. The proper meaning is ousted from usage in the following situations:

(a) The proper meanings have been ousted from usage and habit of the people. In short, they have been abandoned, in favour of another meaning e.g., the word prayer is used for religious praying while 'supplication' is used for 'asking a favour from God'.

(b) The implication of the word itself shows that it has not been used in the proper sense e.g., 'meat' does not mean 'fish'.

(c) Again where the mode of expression and import of the statement shows that proper meanings have been omitted e.g., Sura Kahf *inter alia* lays down that: 'whoever wants may accept Faith and whoever wants may adopt disbelief.'

(d) Likewise, where the status of the speaker and the nature of the statement clearly indicates that, proper meaning is not to be inferred e.g., Sura Kahf *inter alia* states that 'O God forgive me.' Naturally, the believer is asking for a favour and is not issuing an order.

Finally, where the context of the rule itself establishes that the proper meanings were not intended to be conveyed thereby, e.g., *Apostle of Allah informed all concerned that* 'the basis of Deed is intention.'[53] The proper or real meaning of this sentence will be that an action is not taken without intention. Naturally this argument being contrary to realities of life rejects itself. Therefore, assumed meaning will be assigned to it i.e., the reward or punishment for the deeds done shall depend upon the motive.

Proper and Assumed could be both General and Particular

Proper and Assumed meaning both convey General and Particular sense. But according to some Shawaph' assumed is always Particular. For this reason inspite of an agreement as to the meaning, Ahnaph and some Shawaph' disagree as to the explanation thereof.

The Prophet commanded:

'Do not sell one Dirham for two Dirhams and one measure of grain for two measures of grain.'[54]

The second narration is that:

'One measure of dates is not equal to two measures and one Dirham is not equal to two Dirhams.'[55]

The word 'Measure' of grain (Sa') is used in the assumed sense and not in the proper sense. When used in the assumed sense, it signifies all those things which are bought and sold by measure and where improper measuring amounts to usury. Some Shawaph' do not recognize general applicability of an

Assumed meaning. Therefore, they elucidate this Tradition by observing that:

> 'That much of grain which could be placed in one measure is not to be sold for that much of grain which two measures contain.'[56]

Thus difference of opinion among the interpreters is confined to the way they derive the rule but it does not extent to the rule so laid down. Further, even this minor difference is attributed not to Imam Shaph'y himself but only to a few of his followers.

Positive and Elusive Terms (Evident and Indicated) (Sarīh-Kanaya)

A Positive word expresses its meaning in an unmistakable manner, while an Elusive word is one which is used in a manner that its meaning and referent are not clear. The Text and Plain could be equated with Positive while Elusive is like Latent and Loose terms. But the distinction between the two is that in case of Positive and Elusive the way the two are used is taken into account, while in case of Text and Latent the motive of the speaker and the mode of expression are the relevant factors for the fixation of its meaning.

Rules of Positive & Elusive

Positive is binding in action notwithstanding the intention of the speaker. For instance:

A person wishes to say 'thank God' and by chance utters the words 'I divorce thee'. Though the wife is unintentionally divorced but in the absence of taking back till the expiry of the waiting period the divorce will become final or where the matter is taken to the court then court shall have no alternative but to uphold the divorce.

Elusive shall be binding in action when such a conclusion is supported by either intention of the speaker or the mode of

expression. For example, a person says to his wife "you are separated," then it will amount to divorce only if it was an intentional act or other circumstances support such a conclusion.

Positive is plain but Elusive lacks something and therefore, those precepts which could not be proved by 'suspicious' cannot be substantiated by 'Elusive'. Such precepts for the proof require Positive words. For example, those precepts which lay down punishments; rules of expiation; confession of fornication; confession of theft by Elusive words; and where a deaf mute accepts something by making signs.

In fact, both Positive and Elusive are in fact the two kinds of the proper and assumed. However, as some rulings specifically belong to the sphere of the former, a discussion has been undertaken.[57]

Order Proved by a Word

There are a number of different ranks of proof by a word from the angle of probative value. The following may be noted:

1. Prescribed (Farz) 2. Binding in action (Wājib) 3. Recommendatory (Mandoob) 4. Permitted (Mubah) 5. Forbidden or Prohibited (Harām) 6. Disapproved (Makrooh).

Prescribed (Farz): It includes those rules of conduct which have been prescribed by the Criterion and are mandatory in nature and must be obeyed notwithstanding anything to the contrary except where an exemption is granted EXPRESSLY in plain words:

O ye who believe!
Fasting is prescribed to you
As it was prescribed
To those before you
That ye may (learn)
Self-restraint, (2 : 183)

O ye who believe!
The law of equality
Is prescribed to you
In cases of murder:
.....
But if any remission
Is made by the brother
Of the slain, then grant
Any reasonable demand,
And compensate him
With handsome gratitude. (2 : 178)

Binding in Action (Wājib): Binding in Action (Wājib) means that rule of conduct which had to be observed by Muslims. In the case of Binding the obligation to do an act is sometimes gathered by the words and sometimes from an external mode of expression. The difference between Prescribed and Binding is that of degree and not that of kind.

Examples : Rules relating to the procedure of Divorce, treatment of the parents, rules relating to commercial transactions, and obedience to the valid orders issued by those in authority are instances of the rule of binding in nature (wājib).

Where an expression of informative nature is used then, the mode of expression is the decisive factor as regards the binding nature of the order. For example, the Sure Guidance lays down that:

Divorced women
Shall wait concerning themselves,
For three monthly periods. (2 : 228)

If any of you die
And leave widows behind
They shall wait concerning themselves
Four months and ten days: (2 : 234)

In these verses an informative sentence is used, but the importance of the waiting period in these rules of matrimonial

behaviour is supported by a mode which makes them Binding in action.

The emphasis and stress which is placed on the duty to observe properly the waiting period is an enough indication that positive observance is required.

Ahnaph are of the opinion that there is a difference between Prescribed (Farz) and Binding-in-action (wājib). Prescribed is proved only by a definitely reliable implication while Binding-in-action can be established by an argument which is of probable probative value. Emphasis to act positively is expressed in clear and precise manner in case of Prescribed or Mandatory rules. Where mandatory rules are not obeyed by a person then all his deeds become void. In case of orders binding-in-action a violation thereof could be cured by expiation by way of repentence.

Recommendatory (Mandoob or Mustahab) : A recommendatory order is one which requires the performance of some deed but emphasis is not placed for its fulfilment. The rule is thus not preemptory in nature. This fact is sometimes inferred from the words used but in some other situations though the words used enjoin positive action but the mode of expression points to the element that it is merely desirable. Same will be the situation where nothing is said about the punishment which disobedience thereof may entail. Similar will be the result if it is expressly declared to be recommendatory in nature.

Example:

O ye who believe !
When you deal with each other,
In transactions involving
Future obligations
In a fixed period of time,
Reduce them to writing
Let a scribe write down
Faithfully as between
The parties: (2 : 282)

This verse uses the words 'reduce them to writing' which proves that in case where a debt is incurred the transaction be reduced to writing and the expression is positive. But the next verse shows that the order was not mandatory as no emphasis has been placed to follow it. Hence, the rule will be treated as recommendatory only.

If anyone of you
Deposit a thing
On trust with another,
Let the trustee
(Faithfully) discharge
His trust, and let him
Fear His Lord. (2 : 283)

Permitted (Mubāh) : Permitted means where the person is given an option to act positively or to refrain from taking any positive action This discretion is sometimes inferred from the phraseology of the statement under consideration. For instance 'there is no blame of them.' But sometimes the phraseology is such that the inference makes the order obligatory but the mode of expression and the import of the text unmistakably shows that the order was recommendatory.

Examples :

But when ye are clear
Of the Sacred Precincts
And of pilgrim garb,
Ye may hunt (5 : 3)

Disapproved (Makrūh) :

Where the believers are required to refrain from doing some act but the element of prohibition is not emphasised then such an act is called Disapproved act. For instance where some such words are used as, 'Allah has disapproved it' or 'You are required not to do it'. There must exist a mode of expression which permits the conclusion that the act is merely disapproved

by the use of the words which convey the sense of prohibition. For example:

O ye who believe
Ask not questions
About things, which,
If made plain to you,
May cause you trouble. (5 : 104)

In this verse disapproval is proved by the mode of expression. The asking of all types of questions though the problems were not actually faced, has been declared as something which may jeopardise the interests of the people themselves.

According to Ahnaph there are two kinds of Disapproved: (a) Forbidden (Makrūh-Tahrīmi), (b) Recommendatory (Makrūh-Tanzīhi).

Disapproved forbidden (Makrūh-Tehrīmi) is opposite of binding in action wherein the order is proved by an argument of probable probative value. Recommendatory forbidden (Makrūh Tanzīhi) is akin to (Mandūb) which has already been defined in the preceding pages. Disapproved forbidden is an order which prohibits the commission of an act, but the emphasis is of a lesser degree than in the case of forbidden (Harām).[58]

In case of binding in action, recommendatory, forbidden and disapproved (Wāib, Mandūb, Harām, Makrūh) different phraseology is used and the nature thereof is determined on the basis of the mode of expression, address and words, but the primary moods are positive and negative in all such cases. Most of the orders and the kinds thereof, ultimately relate to prohibitions and permissions. A detailed discussion of 'positive action' and 'negative action' is undertaken below, as it is relevant to the scope of expository interpretation.[59]

The definition of imperative mood (positive action) is:

'An order is expressed in the imperative mood whereby

positive action is demanded from a superior and strong position.'[60]

An order demanding positive action is expressed in different ways:

(i) 'Establish prayer and pay welfare tax' (2 : 5)

(ii) Let the man of means
Spend according to
His means : and the man
Whose resources are restricted,
Let him spend according
To what God has given him (65 : 7)

So every one of you
Who is present (at his home)
During that month
Should spend it in fasting,
But if any one is ill,
Or on a journey,
The prescribed period
(should be made up)
By days later. (2 : 185)

(iii) Therefore, when ye meet
The Unbelievers (in fight),
Smite at their necks; (47 : 4)

(iv) But she in whose house
He was, sought to seduce him
From his (true) self: she fastened
The doors, and said:
"Now come, thou (dear one)!" (12 : 23)

(v) Divorced women
Shall wait concerning themselves
For three monthly periods (2 : 228)

Some other uses of imperative mood demanding positive action are as follows:

Required: (Wājib)

Be steadfast in prayer;
Practise regular charity;
And bow down your heads
With those who bow down (in worship) (2 : 43)

Perferred : (Istehbāb)

And if any of your slaves
Ask for a deed in writing
(To enable them to earn
Their freedom for a certain sum),
Give them such a deed
If ye know any good
In them; and ye give them
Something yourselves
Out of means which
God has given you. (24 : 33)

Permitted: (Mubāh)

Eat pure things.

Threatening :

Do whatever you like!

Direction:

And get two witnesses,
Out of your own men, (2 : 282)

The suject-matter of Direction and preferred action is almost the same as in both cases some good is involved, but in case of the former worldly expediency is dominant while in case of the latter some spiritual good is the effective cause.

Reprimand:

"O lad recite the name of Allah and use your right hand for eating and eat what is placed in front of you."[61]

Umer bin Abi Salma was still a minor and while eating his hand strayed around. The Prophet reprimanded him and pointed out the proper manner of eating (food).

Warning:

'Ye inform them. Enjoy as you have to return to Fire.' (14 : 30).

Liberality:

'Eat what *Allah* has provided to you.' (5 : 88)

Honour:

'Enter the paradise in security' (15 : 46)

Dishonour:

'And well ye know, those among you who transgressed in the matter of Sabbath: We said to them: "Be ye apes despised and rejected." (2 : 65)

Creation:

"When he decreeth a matter; He said to it 'Be' and it is." (2 : 117)

Helplessness:

"And if you are in doubt as to what we have revealed from time to time to our servant then produce a Sura like thereunto; and call your witnesses or helpers (if there are any) besides God if your (doubts) are true." (2 : 23)

Insulting:

"Taste thou (this), truly wast though Majesty, full of honour." (44 : 49)

Equal Treatment:

"Burn ye therein: The same is it to you whether you hear it with patience or not: Ye but receive the recompense of your (own) deeds." (52 : 16)

Supplication:

"Our Lord! Adjudicate justly between us and our people." (7 : 89)

To Consider as Inferior:

"Sorcerers, throw whatever you throw." (10 : 81)

Lesson:

"Observe the fruit of the tree when it is fruiting and note its ripening". (6 : 100)

Surprise:

"See! What similarities they narrate before you". (25 : 9)

There are various other examples of the uses for instance it is expressed in a Tradition that: 'When you have not practised modesty then do whatever you like.' (*Bukhari, Mishkāt*)[62]

Hope and Desire:

"They will cry : 'O Malik!'[63]
Would that thy lord
Put an end to us!'
He will say, 'Nay, but
You shall abide! (43 : 77)

The Proper Uses of Imperative Verb:

Majority of the Doctors of Law maintain that the correct or real use of the imperative verb (positive action rule) exists only in cases where the order is of an obligatory nature. While some others hold the view, that such use is also made in case of recommendatory orders. Certain others hold the third view, which reconciles the first two, in as much as they express the opinion that, it is in fact found in case of both obligatory and recommended. This difference of opinion arises when there is no mode of expression which may be used as an aid for such a determination. Where such a mode exists or the composition and import indicate either a command or a recommendation, then, it conclusively decides the matter. But the mode of expression is sometimes capable of turning a command or obligation into a recommendatory order and sometimes it does not possess such a capacity. These two different situations have given rise to a conflict among the jurists.

'There is no blame on you
if ye divorce women
Before consummation or
The fixation of Dower
But bestow upon them
(a suitable gift)
The wealthy
According to his means
And the poor
According to his means
A gift of a reasonable amount
Is due from those
Who wish to do the right thing (4 : 236)

This is a general rule subject to no limits. Its limits are determined by reasonable usage and the extent of necessity. Hanabila, Shawaf' and Aḥnaf accept that, this verse is a conclusive authority for the conferment of a "*reasonable benefit*" on wives who have been divorced before consummation and the fixation of dower. On the contrary, Imam Malik considers it, as merely recommendatory because liberality by those who wish to

do the right thing is merely a desirable or preferred course of action for the muslims. There is no mandatory obligation to do so under this particular verse. However, a better view finds acceptance by the Majority of Jurists who are convinced that, the requirement is not merely recommendatory. They argue that the word 'liberality' used in conjunction with the word 'as a matter of right' (Haqqan) leaves no doubt about the obligatory nature of the command. According to them, the word 'liberality' is used to signify both 'Recommendatory and Binding-in-action' rules.

According to the Doctors of Law belonging to the Manifests (Zāhiri) School of Legal thought, mode is not recognised as a reliable indicator of the meaning of the Text or of its nature. '*Command*' is employed for making something obligatory. According to Ibne-Hazam and others a transaction creating a debt must be reduced to writing and witnesses must testify to it, because the expressions: 'reduce them to writing'; 'get two witnesses'; 'Disdain not to reduce to writing'; 'Take witnesses' are often used to express the imperative mood, and hence positive action is obligatory.

According to the people of the Manifest (Zāhiri school) a believer should recite, "*In the name of God*, Most Gracious, Most Merciful" and eat food placed in front of him by using his right hand (except where some physical disability makes it impossible) as the Apostle of Allah had directed (in the case of Abi Salma).

On the contrary, the Majority holds the view that writing of transactions creating future rights and obligations was only a recommendatory order and a person may or may not follow it according to his personal value judgements. Similarly, they say that it was not at all necessary to recite the praises of the sustainer before enjoying one's food as it was not obligatory but only a course nearer to righteousness (recommended). So in both these cases, these Doctors of law express the opinion that, the observance of these rules was left to the discretion of the Muslims. They rely on the mode of expression for their opinion. Whether

an obligatory rule needed stressing or not is another moot question in this area.

When something is commanded, then, is it necessary to perform the deed immediately? Whether delayed performance is permitted?

There is a difference of opinion amongst the Doctors of law with regard to these questions. Ahnaf maintain that a commandment neither requires stressing nor it is susceptible to it. Imam Shaph'y is of the opinion that, a commandment sometimes require stressing.[61] While others say that, a commandment does requires stressing. This conflict of opinion gives rise to other difficulties in the determination of the proper rules of conduct. (Sura Alma'ida, Verses 7 & 8) *inter alia* provide that:

Verse 7: "...Then take for yourselves, clean sand or earth, and rub earth, and rub there with your faces and hands. God doth not wish to place you in a difficulty, but to make you clean, and to complete his favour on you, that you may be grateful."

Verse 8: "...His convenant, which he ratified with you, when ye said, 'we hear and we obey.' And fear God, for God knoweth well, the secrets of our hearts."

Ahnaf take the view that ablution with clean sand or earth enables a person to perform any type of prayer i.e., Prescribed or Practice of the Prophet and optional (Farz-Sunnat-Nafil), and one such ablution is enough before a set of prayers which will continue to be effective till violated. Hanabila agree with this view with the difference that such ablution will remain effective till the time of the next set of prayers.

However, according to Shawaf' one ablution with clean sand or dust shall precede each prescribed prayer. But so far as the performance of optional prayers is concerned they insist on no such repetition. Their argument is that, the possibility or need of stressing or emphasis cannot be completely ruled

out in case of positive orders. Malkia Jurists follow the same view.

This difference of opinion, viewed from the angle of ultimate results, is very restricted, and is confined to absolute commandments. Such commands constitute a very small part of the Shariah. Even this difference will be material only in the absence of a *mode* or *import*, which is found generally. (A detailed discussion is omitted because of the constraints of the nature of this study).

Those Doctors of law who prefer the view that a commanding statement sometimes requires emphasis or stressing, believe in the immediate performance of the act or deed which is demanded. While those who are not so inclined do not insist on immediate performance e.g., the commandment to pay welfare tax (Zakāt). Hanabila declare that, it shall be paid as soon as it becomes payable. Others declare that, immediate payment is not obligatory but it is only a desirable course of action.

Definition of Prohibited

Negative order is the opposite of the positive order and demands that one should refrain from doing something. It is defined by Abdulla bin Ahmad as *an order not to do something issuing from a higher and superior authority.*[65] A demand not to do something is expressed in different grammatical ways:

(a) *Where the act itself is prohibited e.g.*

Nor come nigh to adultery:
For it is a shameful (deed)
And an evil, opening the road
(To other evils). (Sura *Bani Israil*, Verse 32)

(b) *Where the imperative mood by implication prohibits the act or deed;*

To shun the abomination
Filth of idols and shun
The word that is
False (lies). (Sura *Hajj*, Verse 30)

(c) *Where the subject matter is negative though the mood is not prohibitive:*

Lo! Allah enjoineth justice and kindness, and giving to kinsfolk, and forbidden lewdness and abomination and wickedness. He exhorteth you in order that you may take heed.

(d) *Where for the purpose of restraining a person from doing a particular act an informative sentence is employed wherein prohibition is expressed or permission is denied*:

i) "Prohibited to you
(For marriage) are:
Your mothers, daughters,
Sisters, father's sisters,
Mother's sisters...,'

ii) "O ye who believe!
You are forbidden to inherit
Women against their will..."

Uses of Negative Verb

The Negative mood is used in different ways

I. **Forbidden:** (Tahrīm)

"And marry not those women whom your fathers married, except what hath already happened (of that nature) in the past, Lo! it was ever lewdness and abomination, and an evil way".

II. **Disapproved:** (Makrooh)

"No person should touch the genital organs during the act of urination." (Bukhari)[66]

III. **Supplication:** (Duaa)

"Our Lord (they say)
Let not our hearts deviate
Now after thou hast guided us..."

IV. **Beneficial Guidance:**

"O! Ye who believe!
Ask not questions
About things which
If made plain to you
May cause you trouble.
But if you ask about a thing;
When the *Qur-ān* is being
Revealed, they will be
Made plain to you..." (*Sura Maida Sec. 14*)

V. **To look down upon:** (Haqīr)

"Nor strain thine eyes (in longing)
Towards that which we cause
Some wedded pairs among them to enjoy,
the flower of the life of the world that we
may try them thereby." (*Sura Taha Verse 131*)

VI. **Ultimate End:**

"Deem not that Allah is unaware of what the wicked do. He but giveth them a respite till a day when eyes will stare in terror."

VII. **Happiness:**

"(Then it will be said): O ye who disbelieve

Make no excuses for yourselves this day.
Ye are only being paid for what ye used.

VIII. **Affection:**

"Do not turn cots into chairs"
(Apostle of Allah directed).
(*Masnad*, Ahmad bin Hanbal).[67]

IX. **Forbidding Harshly:** (Threat)

Do not obey my orders?

X. **Request :**

Please do not do it. (Alamadi).[68]

Proper use of the Negative

The Majority of the Doctors of Law hold the view that *to forbid* is the crucial factor when it is devoid of a particular mode of expression. While others say that it is common in both Prohibition and Disapproval. The Holy Qur-ān directs:

"O Ye who believe! Shun suspicion; for Lo!
Some suspicion is a crime. And spy not,
neither back bite one another. Would one
Of you love to eat the flesh of his dead
brother? Ye abhor that (so abhor the other)!
And keep your duty (to Allah). Lo! Allah
is Relenting, Merciful. (*Hujrat : 12*)

The majority of the Doctors of Law take this verse as a proof of the prohibition of spying on others and backbiting. While others say that initially it will prove disapproval. In both cases the mode of expression should not be contrary to such an inference. Some others consider it as 'brief' or abstract. To take it as ordaining prohibition or disapproval an elucidation or clarification given by the law giver shall de necessary. The Apostle of Allah has declared that: 'A person should not

transact business in the face of an ongoing transaction between two others, (Muslim-Mishkāt). According to the majority of jurists a person should not transact a deal till the conclusion of a purchase and sale transaction being conducted between two other persons, as it is prohibited.[69] Others treat it as merely disapproved. In case of both, the absence of a particular mode of expression is a condition precedent for the inferences drawn by the two groups of jurists. While some other jurists maintain that the act involved is both disapproved (Makrooh) and forbidden (Harām), therefore, a clarification by the law giver is necessary.

Another Discussion about Negative Orders

The most question is that in case of a violation of an act which is impermissible (because of the employment of the negative mood) could be taken to have come into existence or not?

Different opinions have been expressed by the jurists. The majority holds the view that, where such prohibition is in the field of religious rituals, then, such violation will be void *ab initio*. But in case of worldly affairs the commission of the act will be treated as imparting it an independent existence.

Examples of the two rules:

a) where a person refuses or fails to pay welfare tax though having the prescribed minimum amount of wealth, this act will be void *ab initio* and the existence thereof will be denied, "and no rule will apply to it;" and

b) where a person engages himself in buying and selling transactions during the time of the prayer call for Friday prayers. The act will be accepted as to have come into existence.

Some jurists hold the opinion that in both the above mentioned situations the act will be void *ab initio*. While still others chip in by asserting that in both cases the commission of an

act will establish its existence as well. They draw no distinction between religious rituals and worldly affairs.

Righteous and Evil Deeds

An act is righteous or evil because it is demanded or prohibited. Shawaf' and People of Tradition (Ahl-e-Hadith) maintain that, a positive or negative command establishes the evil or good nature of the deed involved. Ahnāf deny this, and declare that, the nature of a deed is prooved by intellect and positive or negative expressions are only tools of reasoning for its proper comprehension.

Those leaders of interpreters who treat righteous and evil determinable with reference to Islamic Law, their sphere of interpretation is quite limited. On the other hand those who take intellect as the determining factor their interpretative effort extends to a wider area.

The most crucial questions are whether an evil doer exposes himself to the displeasure of Allah and to consequent condemnation and punishment or not? Whether a righteous person (who does good deeeds) will be entitled to receive the pleasure of Allah and the necessary rewards? Or in other words, the basic principle that those who believe and fear God and follow the *Path of God* (Sabeel-e-Allah) act in a righteous manner and do deeds which are 'pleasing to Allah' and shun all that which incurs 'His displeasure', are the only beings who are called as 'Mominīn' in the Guidance Sure which is the criterion of right and wrong or others who act differently can also be called the 'True Believers'? There is a sharp difference of opinion about this rule among the Jurists. Apart from this, there is no difference regarding the righteous and evil deeds amongst the Jurists. All of them agree that intelligence determines such characteristics notwithstanding the fact that such deeds fall within the category of religious or temporal matters.[70]

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63. Al-Ghazali, *Almustasfa*; Mulla Jiwan, *Nurul-ul-Anwar*; Muhammad Ahmad Sarakhsi, *Usūlul Sarakhsy:* Al-Amudi *Al Ihkām fi Usūl.*

64. *Usūlus Sarakhsi* Vol. I, Fasl fi Bayān Muqtazal Amr.

65. Abdullah bin Ahmad bin Mahmood Abulbarkat Alnasafi, *Almanar.* Mabhath al-Tahi.

66. Bukhari, Vol. I.

67. Ahmad bin Hanbal, Musnad, Vol. III, p. 439.

68. Al-Amudi, Dr. Mustafa Saidul Hasan: *Athrul Ikhtilāf.*

69. Muslim, *Mishkat*, Chapter: Almanhy Unha Min Albiua'.

70. Ahmad bin Abdullah Alnasfi, *Kashful Asrar*; Maulanā Abdul Hai Lucknawi; Hashia Qamarul Aqmar; Muhammad Ma'rwf Aldwalibi, Al-Madkhal.

Chapter VI

Interpretation Deducere

(Deductive-Inductive Interpretation) (Ijtehad-e-Istinbaty)

Deductive interpretation denotes an interpretative effort where the 'effective cause' of a precedent is noted and wherever the same cause is found the pre-existing ruling (precedent) is applied to such a situation. The basic principle is that the true basis of a ruling is the effective cause and hence similarity of the circumstances of the two situations justifies the application of a pre-existing ruling to a new problem. The golden rules which regulate this method of interpretation are:

(a) Qayās or Analogy, (b) Istehsān or juristic reference; and (c) Istidlāl or Rationem (legal argument or Rational Reasoning).

Operational rules of conduct are determined on the foundation of one of the three methods of interpretation and the employment thereof is determined by the characteristics which constitute the distinguishing feature of a particular controversy, or conflict which is to be resolved according to the relevant legal precedents.

Analogy (Qayās)

The literal meaning of the term Qayās are, measuring, estimation, equation (making two things equal) or drawing some inference from existing legal principles. Sadar Alshariat Quaẓy Abdullah bin Mas'wd has defined this method of interpretation as:

"The equation of the two effective causes is the basis of

57. *Usūlus Sarakhsi*, Part I, Alhaqīqat-wal-Majāz; *Al-Talvīh, wa-al-Tauzīh, Nurul Anwar.*

58. *Usūlus Sarakhsi, Nurul Anwar, Al-Sarīh-wal-Kinayat.*

58(a). Author's book titled, *Tauzīh Talweh*; *Taqrīr Wat Takbīr.*

59. 'Ali bin Abi 'Ali Ibn Muhammad Al-Amudi al-Ihkām Fi *Usūlul Ahkām*; Abdul Wahab Khallāf, *Ilm Usūlil Fiqh.*

60. See note 59.

61. Bukhari, Muslim, *Mishkat*, Kitabul Atimah.

62. Bukhari, *Mishkat*, Arrifqwal Hayā.

63. Al-Ghazali, *Almustasfa*; Mulla Jiwan, *Nurul-ul-Anwar*; Mubammad Ahmad Sarakhsi, *Usūlul Sarakhsy:* Al-Amudi *Al Ihkām fi Usūl.*

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"The equation of the two effective causes is the basis of

deriving an operational rule from a root (parent) principle. The effective cause is not merely derived from mere dictionary meaning but is arrived at by deep thought and reflection."[1]

Ibne Badran of Damascus Sheikh Abdul Qadir bin Ahmad bin Mustafa observes that:

"PHURU is equated with ROOT and this EQUATION is the effective cause of the order."[2]

Analogy denotes the interpretative process by which an original (pre-existing) situation is equated to a new situation. This equation between the effective cause of the '*precedent*' (Nazeer) and the '*New Ruling*' imparts legality to the latter.

Ibne Timiya Taqi-ud-Deen Ahmad and Ibne Aljozyt hold the view that analogy signifies:

"The effective cause which is the basis of the precedent exist in the new situation also and there is nothing in the new situation which may obstruct the application of the precedent (parent rule)."[3]

Practically speaking the rule of analogy is the method of resolving new issues in the light of pre-existing rulings or precedents and the circumstances of the new situation. In some cases new issues could be resolved in the light of the rulings found in the text (Qur-ān and Tradition) through the method of deductive-inductive interpretation. Secondly, it may be searched and recognized by intellectual efforts from an existing ruling and thereafter the effective cause of the new ruling be found. Where the two are the same, the pre-existing order will be applied to the new problem. This process of equating the precedents and the new situations is called analogy.

Difference between Analogy and Implication of the Text
(Qayās-Dalālat-un-Naṣ)

This equation also conditions implication of the text but in searching and finding out the effective cause it does not present much difficulty. The order is easily derived from the literal meaning and the effective cause is understood from the order itself. However, in case of analogy, literal meaning is not enough and deductive method of drawing inferences is to be employed.

For example, the Message reprimands that :

They Lord hath decreed
That ye worship none but Him,
And that ye be kind
To parents. Whether one
Or both of them attain
Old age in thy life,
Say not to them a word
Of contempt; nor repel them,
But address them
In terms of honour. (17:23)

The verse lays down the rule that children must honour, love and treat the parents with utmost care and with due humility. They should not in any manner cause them the least harm, pain or trouble. Naturally when the causing of 'least trouble' is prohibited, the inference is inescapable that things which cause a greater harm or pain shall also be likewise forbidden. The effective cause is thus *causing pain or trouble to parents* in old age when they naturally look upon the children for comfort and solace. The text is clear and thus the effective cause could be comprehended quite easily from the phraseology and need of any further thought and reflection does not arise.

Examples:

A. The Criterion enjoins the Muslims not to join two sisters in wed-lock. Likewise precepts of the Prophet forbid the joining of father's sister and brother's daughter or mother's

sister and sister's daughter in marriage. These rulings are the root principles where the effective cause is *prohibition of disrespect* of genealogical relations. The jurists taking the precedent as the basis have inferred the rule that where out of the two women, one was assumed to be a male, then if the two cannot marry, then the two women shall not be joined in marriage. The effective cause is the same, hence this analogical deduction is correct.[4]

B. The Holy *Qur-ān* forbids the consumption of (all kinds) of wine and the effective cause of the order is the '*intoxicating*' quality. Hence the jurists have laid down the operational rule of conduct as, '*all those substances which produce a state of intoxication are not be consumed by Muslims and the consumption of all such substances is forbidden*'. For instance, 'Nabaid' which is a drink prepared by dissolving dates in water and is consumed after being kept for some time is to be treated like wine where frothing occurs or when the taste becomes bitter. Such 'Nabaid' produces intoxication and hence its consumption is prohibited. Briefly, the name is immaterial and the deciding factor is the presence or absence of the quality of producing intoxication. (*It may be noted that the question of quantity consumed to determine whether it was enough to produce a state of intoxication is irrelevant in this case*).

C. The Prophet directed that a person should not start negotiation for purchasing or selling something during the period when the other brother was doing so, and must wait till such negotiation comes to an end. Jurists relying upon the effective cause which is *causing of inconvenience* to a brother have extended the application of this rule to other transactions e.g., negotiations for renting something.

Elements of Analogy

There are four essential elements of the rule of Analogy:

(i) Original legal principle applied to the past situation.

(ii) Derivative legal principle applied to the present situation.

(iii) Operative order which is to govern the present situation.

(iv) Effective cause which provides the proof of the Operative Order applicable to the present situation.

A. Original Legal Principle (Aṣal)

Analogy requires that original legal principle is supported either by the *Qur-ān* or the precepts and practices of the Prophet.

An original legal principle is proved by Consensus may also validly form the precedent for further analogical deductions, as its ultimate authority is derived from the *Qur-ān* and the *Hadith*. For instance, in case of wealth belonging to minors the rule of guardianship is proved by Consensus and such wealth could not be appropriated except according to the wishes of the guardian. The jurists have extended this analogy to the guardianship of minors in case of marriage also. Consequently, marriage of a minor son or daughter without the consent of the lawful guardian will not be proper. Likewise, there is consensus about the rule that a person who attains the age of maturity *can utilize or appropriate* the property or wealth according to his own judgment. This analogy has been extended by the jurists to the matter of marriage also. Thus, as a guardian cannot exclusively control the wealth or property of an adult, likewise, he cannot compel an adult to choose a particular person as his/her spouse.

Maliki's have further extended the role of analogy and maintain that if precedent or parent order is proved be analogy it could act as the basis of further analogy. Because the new ruling (PHURU') derived from analogy assumes the characteristics of a precedent or parent order.[5] Hence, it can certainly be relied upon as a precedent.

But recourse to this method could be taken only in those cases where it is difficult to base analogy on the *Qur-ān*, *Hadith* and *Consensus* (Ijma').[6]

Shakir Hanbali[7] states that:

'that analogy based on original legal principle proved by analogy is not valid. However, where original legal principle is proved by the Book, Sunnah, Concensus or Juristic Preference (Istehsān) it can validly form the basis of analogy.'

But certain other *Hanabila* hold the view that valid analogy can serve as precedent for further analogical deductions.

Almugadassi Abdullah bin Ahmad bin Qadama[8] says that:

'*Analogy could form the basis of Analogy.*' A proven Analogy becomes the original legal principle and could be relied upon like the Texts.'

Derivative Legal Principle (Phuru')

There should not exists any factor which may prove the Derivative Legal Principle either positively or negatively. In the former case analogy will be unnecessary andin the latter case it will not be correct. Derivative Legal Principle is not obstructed by any legal argument and nothing impedes its operation to provide a relevant legal solution to a new situation or controversial issue of a legal nature. The Derivative Legal Principle should not precede the original legal principle in point of time, and where it is so, analogical deduction will not be valid.

It will be wrong to maintain that as 'intention' (Niiat) is necessary in case of ablution by water therefor it will be necessary in case of ablution by dust. The reason is that the order of ablution by water was revealed before the Migration while that relating to ablution by clean sand was revealed after the Migration.

Operative order (Hukum)

An operative order should not be an order which applies particularly to a person or persons because then analogy could not be validly based on it. In short, it should not have particular

applicability but must be one which applies generally to the subject matter covered by it. The Apostle of *Allah* is reported have observed about *Hadrath Khazima* that:

'The testimony of Khazima alone is enough'.[9]

The background of the said *Hadith* is that the Prophet purchased a camel and also paid the price but the owner thereafter denied the payment of the sale price. The seller, an Arab, demanded that some testimony be established about the fact of the payment. The Prophet then said, 'who will testify for me ?' Hadrath *Khazima* came forward to testify and said, 'I testify that the Prophet has paid the price of the camel to this Arab.' The Prophet asked, 'How you can testify when you were not present at the time of payment.' Hadrath Khazima said: "When I do testify about matters which you bring from Heaven (are revealed to you by *Allah*) then, why should I not testify about that which you have said about the payment of the price (on this earth)."

The order must relate to matters which could validly be determined by an analogical deduction and it will not be proper in matters which could not be decided by analogy. The following matters are not susceptible to analogy:

Religious rituals like prayer, prescribed minimum for the purpose of liability to pay welfare tax (Zakāt) formalities of pilgrimage, the number of fasting days, the punishments ['QUBAT] which have been expressly prescribed by the *Qur-an*, and matters relating to expiation [KAFFARAT] as specified and those shares which have been fixed by the *Qur-an* for heirs of a deceased [PHURUS].

In case of the matters mentioned above i.e., (*Ibādat*, *Uqubat*, *Kaffarat* and *Phuruz*) analogy could not be employed and relied upon.

However, according to Imam *Shafi'i* and *Ahmad bin Hanbal* analogy could be validly used and relied upon in case of prescribed punishments (Uqubat) and expiation (Kaffarat) e.g.,

the punishment of theft prescribed by the *Qur-ān* could be extended to all the acts which involve *stealing* because this effective cause is common to all kinds of theft.

Imam Abu Hanipha rejects this principle in case of the shroud-stealer because a grave could not be considered as a place of security. Likewise, if a person violates a fast and before paying the expiation violates yet another fast (Rwẓa) then the view of Imam Malik and Shaph'y is that expiation will be compulsory for the violation of the two fasting days separately. On the contrary, Imam Abu Hanipha does not corelate the number of violations and the expiation and declares that only one expiation will be enough.[10]

Ahnaph do not consider analogy as valid in case of prescribed punishments (Hudūd) and expiation (Kaffarat) but still some instances to the contrary are found in their interpretations also.

Examples: Where a person intentionally commits sexual intercourse during the state of fasting he is to pay expiation for his indiscretion. On this basis the Jurists have laid down that the same rule will apply where a person takes food intentionally while fasting. Likewise the rule is that no animal is to be killed by way of hunting within the Sacred Precincts. They equated it with the killing of a person by mistake, and declared that expiation shall be obligatory. Ahnaph have tried their level best to justify these rules by some other legal devices but all such exertions have been futile.

(Secondly, where the operative order is analogical but no precedent exists outside it.) For instance the cause of the concessions available to a traveller is travel upto a prescribed distance and the nature of the mode of transportation. These concessions could not be extended to other matters as the effective cause will not be the same. The operative order must be of Islamic Law (Shara'y). In literal (Lugwi) matters analogy is not valid. Majority of the jurists hold this view. Therefore, 'Sodomy' cannot be equated with 'fornication' (but some jurists disagree). Further the operative order must not be one which had already

been repealed because such operative orders cannot be applied to other matters. Further, the operative order must be an exception to a general principle of law. If so, then the operative order will be considered contrary to analogy.

Example: Prophet permitted Bay'-e-Salam i.e., transaction where a person may give a certain sum of money on the condition that on a future date he will be entitled to purchase some produce belonging to another on a certain rate specified at the time of the conclusion of the transaction of debt. Although the general rule is that transfer of a property which was non-existent at the time of transfer is not valid. But, the Prophet permitted such transactions on the ground of *'necessity'*. Hence, Bay'-e-Salam is an exception of the general rule and this analogy could not be extended to other cases.

According to Imam Abu Hanipha this operative order could not be extended to other situations. But Imam Shaph'y, Ahmad and others maintain that, it could be used as a precedent for the purposes of analogical deductions e.g., the mango crop is sold before the fruit is ready for consumption. Imam Abu Hanipha considers this transaction of sale as invalid till the time mangoes ripen. Such a transaction according to him could not be treated as Bay'-e-Salam. Hence, the operative order which applies to the latter could not be validly applied to the former.

On the contrary majority of the jurists (Jamhwr Fuqhā) disagree and maintain that such analogy will be correct, as the effective cause, i.e., *necessity and usage* is common to both the transactions.[11]

The Prophet also permitted Bay'-e-'Uraya, where transfer of one kind of produce is made for another kind for less or more as the case may be, although the general rule prohibits such transactions. Muhammad Bin Labid has narrated that:

He asked Zaid 'What are these "Uraya"? Zaid mentioned the names of some needy persons from amongst Ansar and stated that these people approached the Prophet and com-

plained that they could not purchase fresh dates because of the paucity of cash and therefore, the rule against such transactions caused them much hardship. The Prophet said that you may exchange dry dates which you usually have for fresh dates. Thus you will not be deprived of fresh fruits.

Imam Abu Hanipha considers an analogy based on such exceptions to the general rule as invalid and improper. The majority of Jurists once again disagree with him and assert that where the effective cause is common, analogy will be valid. For example, the rule relating to dates could be extended to grapes where the effective cause i.e., common good by removing the hardship, will be the same. For the purposes of analogy it is not necessary that the operative order should be an ordinance of general applicability and analogy is permitted in case of operative orders granting some concession e.g., prohibition of intoxicating drinks or that a murderer shall not inherit. Concession or exception of the rule means an order which for a certain reason applies only to a particular person or period of time e.g., consumption of liquor when indispensible is permitted or the use of prohibited things in case of dire need.[12]

Effective Cause ('Illat)

The effective cause is a crucial factor in case of analogy and is quite a complex matter. The Jurists point out the following elements as important in the field of analogy as a source of law whereby relevant precepts are determined to resolve new controversies or issues.

The jurists have explained that precepts (Ahkām) are intimately related to four elements i.e. (i) Effective cause, (ii) Reasons, (iii) Conditions, and (iv) Symbol.

Effective Cause

Effective cause means a factor which produces a change in a particular state of affairs, such as a disease which disturbs the health of a person and causes ill-health,

Ibn Amir Alhāj[13] defines it as:

> The proof of an operative order must exist independent of the effective cause. Effective cause must not be the reason for the proof of the operative order.

Abdul Aziz bin Ahmad,[14] defining effective cause gives a very simple and correct definition when he says that:

> '(it is a factor) to which the proof of the order was originally attributed.'

An order sometimes relates to certain reasons, but even in such a case effective cause is the real basis of such a connection. However, the 'proof of Operative Order' is referable only to the effective cause. Where this reference is to any reason or characteristic or quality then they fall within the category of an effective cause.

Reason (Sabab)

Secondly, the literal meaning of 'Reason' is that path or method which reaches to the object. The Holy *Qur-ān* states that:

> Verily we established his power
> On earth, and we gave him
> The ways and the means
> To all ends. (18:84)

According to the opinion of Jurists the way or method of reaching the order is called 'Reason'. Path and following the path are two different things, and the former is the 'Reason' while the latter is the 'effective cause'. The reaching will be referable to 'walking' and not 'the path'. Reaching an objective will be found only when walking has been proved. The mere existence of a path is not material unless walking is undertaken because it cannot be traversed otherwise. Where rope, bucket and well, are there but no effort is made to draw water then they will be useless.

Thus drawing of water will be referable to the physical exertion (effective cause) undertaken to draw water and not to either rope or bucket. Whenever such a reference is made then it will be through the medium of human exertion.

Alihashi Nizam Uddin[15] observes that:

'The *path* which reaches the *order* through some medium is '*reason*' and *medium* is the '*effective cause*'.

Condition or Stipulation (Sharṭ)

Further, according to the Jurists '*condition*' means something on which the existence of the Operative Order exclusively depends (condition precedent). Abdul Aziz bin Ahmad[16] is of the opinion that:

'Condition (Stipulation) is that thing whose time of the pre existence is the factor to which the existence of an Operative Order is referable.'

The existence of an order and its proof are two different matters, while the existence of an order depends upon the existence of a condition precedent, the proof thereof hinged on the effective cause. The Jurists have explained the relationship betbeen these factors and the Operative Order. Alihashi Nizam Uddin[17] observes that:

'An order is referable to Reason, is proved by its Effective Cause and *comes into existence* by its condition.'

Symbol ('Alāmat)

Symbol means some distinguishing sign, such as a tower which is the sign post for a path or mosque. Something which indicates the other is called an indicator or symbol. Hence, technically speaking, something which indicates a particular order is called a symbol. Abdul Aziz bin Ahmad[18] has defined a symbol as:

'That thing which neither indicates the existence of the order nor it relates to order or to the proof of the order.'

Reason and symbol are equal in this regard i.e., the existence and proof of an order does not depend upon them. Reason is the path or method of reaching an Operative Order (conclusion) and symbol only acts as an indicator. However, the condition and effective cause are different in as-much-as condition provides the proof of the existence of Operational Order while Effective Cause proves both *proof* and its obligatory nature. Thus all the four relate to an Operative Order in different ways:

(a) The effective cause provides both the proof and the existence of an Operative Order;

(b) Without reason an Operative Order cannot be found (or reached);

(c) An Operative Order does not come into existence without condition; and

(d) Symbol is indispensible for the recognition of an Operative Order.

Recognition of Effective Cause

The capacity to differentiate between effective cause, reason and condition is acquired by learning and practice. An indepth study is necessary to comprehend the intricacies involved in understanding the complex questions relating to mode of expression, emphasis, reference etc. For example, when we repeatedly observe the manufacturing process of house-hold furniture then we give different names to the different factors involved. We name the product as Chair of Teakwood of the Victorian or Louis XIV Style and also note the quality, the price, the utility and the suitability thereof. Same is the case where some act is repeatedly observed e.g., prayer performed by the Prophet.

It is quite obvious that this task is complicated, therefore,

one must strive hard to acquire knowledge and facility in performing this delicate job and can usefully take the help of rules laid down by eminent Jurists.

The Text (Naṣ)

Ways and means to recognise an Effective Cause are many and the foremost are *Qur-ān and Hadith, consensus* (*Ijma'*) and *Interpretative effort* (*Ijtehad*). For instance, prohibition against intoxicating drinks or that of performing prayer in the state of intoxication, depends upon the "intoxicating quality of the drink." It is provided by the Qur-ān that:

"O ye who believe!
Approach not prayers
With a mind befogged,
Until ye can understand
All that ye say,
Nor in a state
Of ceremonial impurity..." [4:43]

Ijma'

Secondly, Consensus is also a method of knowing the effective cause of an Operative Order e.g., in case of inheritance a real brother takes precedence over the foster brother because of a nearer relationship to the deceased. Relying upon this effective cause a real brother is preferred to a foster brother in case of guardianship and likewise in the absence of the father a grandfather is accepted as the guardian in matters of property and marriage.

Interpretation

Finally interpretation is by far the most important method of understanding and determining an Effective Cause.

Interpretation and Effective Cause

Before discussing the role of interpretation in the area of

our enquiry some technical terms deserve notice. Clarification and determination (of the Effective Cause); Specification or derivation (of the Special Characteristics which has the capacity to be taken as the appointed Effective Cause); and Research and application (to find out and apply the Effective Cause).

Specification of the Effective Cause or Basis (Tanqih-e-Manat)

Specification of the Effective Cause is an effort whereby the cause is differentiated and clarified by intellectual effort. Thus, the statement is purged of all irrelevant matters. The Effective Cause is thereby determined with certainty and finality.

Qazi Shwkani[19] defines '*Specification*' as:

> 'The process of *clarification* and *differentiation* is to get rid of all unnecessary things which cause a difference and thus the root is equated to the branch.'

A consideration of the event or circumstance wherein Operative Order is present is carefully considered and different characteristics are noted. Some of them are relevant to the order and constitute its basis (Manaṭ) where some others are irrelevant and thus ineffective. So far as their effectiveness of the Operative Order is concerned effective and ineffective factors are separated through interpretative effort and those which are ineffective or irrelevant are discarded. The relevant ones form the basis (effective cause) for an operative order. The process is called specification through clarification and differentiation (Tanqih-e-Manaṭ).

Examples: An 'Arab came to the Prophet and exclaimed, "I have been killed!" The Prophet enquired, "What (reason) killed you?" He replied, "I intentionally committed sexual intercourse with my wife during the month of fasting." The Prophet ordered him to pay expiation for his indiscretion. This event has a number of factors which may be regarded as the basis of the Effective Cause of the Operative Order, such as, the religion of the person concerned, commission of sexual intercourse with the wife, the fact of sexual intercourse com-

mission of the act during a fast, doing of the act during the month of fasting and intentional commission of the act. The function of the interpreter is to find out which of the characteristics is such which may form a valid basis (effective cause) of the Operative Order. This is to be done on the basis of arguments pro-and-contra. So viewed the Effective Cause in this case is the '*commission of the act intentionally during a fast in the month of fastingi*' (Ramdhan) all other factors are irrelevant, hence ineffective (Ghair Muassira).

Derivation of the Effective Cause (Takhrij-e-Manat)

To infer the Effective Cause according to the established methods of interpretation and specify the same with reference to a particular order is called the derivation of Effective Cause. Imam Alghazali observes:

> "It denotes the derivation of an established Effective Cause of an order according to the established methods (of interpretation)."[20]

Derivation of the Effective Cause of an Operative Order is the process by which that characteristic is determined which possesses the capacity to be the Effective Cause of an Operative Order relating to the issue under consideration. For instance the application of the law of equality (*Qiṣaṣ*) in case of murder is based on the fact of *killing* which constitutes its Effective Cause. The way, method, or means used to commit murder are all irrelevant factors. The law of requital thus recognizes intentional killing as murder. A killing which occurred as a result of mistake, madness, accident and other similar factors, is treated differently.

Application of the Effective Cause (Tahqiq-e-Manat)

Application of the Effective Cause means the application of that Effective Cause which is found in the Original Legal Principle through intellectual effort to the controversy under consideration. Siddique Hasan Khan[21] has stated that: The process known as the application of the basis of an Operative Order (Tahqiq-e-Manat) is "the application of an Effective Cause

already established on the basis of Consensus or the Texts (The *Qur-ān* and the *Hadith*) to the controversial issue under consideration through interpretative effort." For the enforcement of an Operative Order the fixation of the situation to which it shall apply is part of this process.

Alshatabi (the renowned scholar) observes:

> "The order is itself proved by the *Shariah* but the circumstances or situations to which it may apply still requires further deep thought and reflection."[22]

Application of the Effective Cause encompasses a number of different situations.

Firstly, where the order exists and the Effective Cause has already been appointed and the only step which remains is its application to the present controversial legal issue, so that it may become an operative order by means of interpretative effort. Example: The Holy *Qur-ān* has prohibited usury entirely. The enforcement of this original legal principle to different situations is undertaken through interpretative exertion.

Hence it will be necessary to seek and recognize the Effective Cause, so as to determine things to which the rule will apply and those which shall be exempted. Ahnaf declare that the *kind* and *quality* of a thing, weight and measurement thereof are the elements which provide the effective cause of the original legal principle forbidding USURY.

The matters not covered by *Hadith* are to be considered through an interpretative effort for finding out whether this effective cause exists or not so as to exempt those where such an Effective Cause is absent.

Secondly, in some cases original legal principle and the Effective Cause both are available and only the application thereof is to be determined. The situation or a class of situations or legal issues to which the Operative Order may be made applicable are to be fixed. The important instances of such an

interpretative effort are found in the *Awalyat of 'Umer.* Further, all those rules of conduct which were designed or may be designed today to meet the changing demands of an ever developing society also fall within the category of enforcement of Operative Orders. Likewise the concept of adjudication and of a Court are well established, but whether a particular authority, tribunal, board or adjudicator is covered by the term 'Court' is a question which requires determination very often. It is to be decided whether it enjoys those powers, follows such precedures and can hand down such judgments which are adequate to treat it as a COURT OF LAW. These factors are variable and hence whenever such a situation arises (such situations arise at all times in various societies) a careful interpretative effort had to be undertaken and conclusions announced to conclusively determine the controversial issues.

Some Rules Relating to Effective Cause

Eminent Jurists (who were also research scholars) categorically assert that every rule of conduct (order) is invariably supported by an effective cause. It is a different matter altogether that it may not be comprehended or that because of its peculiar nature it cannot form the basis of another Operative Order, relating to the event or legal issues involved therein.

Secondly, in certain cases all those characteristics which are found in a particular event or situation do not condition the Operative Order and only one or few of such qualitative factors actually constitute the Effective Cause.

For example: According to Ahnaf in case of the rule prohibiting usury only kind (class of species) and quantity (either measured or weighed) forms the Effective Cause. Therefore, all other factors such as taste, food value etc. have been rejected. Some other jurists have accepted one or other characteristic as the Effective Cause but none of the Jurists have accepted all of them as the Effective Cause. Some reject one element while others reject yet another.

Thirdly, it is necessary for a valid effective cause that the

relevant elements or factors which form its basis must be *explicit* and not implied, otherwise it will be difficult to accept it as the basis of the Derivative Legal Principle.

Example: Proof of parentage is the existence or acceptance of the marriage relationship. Both these factors are explicit.

Where the relevant factor which is the basis of an Effective Cause is implied then there must be some manifest symbol as its proof. Such as CONSENT forms the Effective Cause in all contractual affairs, but is not explicit and for this reason some particular words are appointed to signify it.

Fourthly, the Effective Cause must be *definite* because an indefinite one creates many difficulties for its use as the basis of an Operative Order. An indefinite Effective Cause is subject to constant change with reference to persons, circumstances, places and time. For this reason it becomes impossible to fix its limits of application. Actually a defined Effective Cause is like a rule of grammar and one who is knowledgeable can easily use it. Such an Effective Cause permits discussion about prohibitions and remissions easily and certainly and one who knows can easily determine whether they are lawful or unlawful. Therefore, it is a well established rule that an Effective Cause must be precise and definite.

Fifthly, an Effective Cause should be acceptable to reason and logic otherwise it becomes very difficult to connect it to Operative Orders.[23]

Hazrat Shah Wali Ullah[24] states that:

> It is necessary that the Effective Cause of an Operative Order must be that characteristic which people might know (understand), and it should be explicit.

Finally, Effective Cause must be capable of being transferred to the Derivative Legal Principle. It should not be non-transferable (Qasira) because of its exceptional nature.

However, Imam Shaph'y holds the view that even a non-transferable Effective Cause can validly form the basis of another Operative Order. But Imam Abu Hanipha insists that it must be transferable and rejects the view that a non-transferable Effective Cause could form the basis of a Derivative Legal Principle. The difference of opinion is, however, confined to cases where the Effective Cause was found by an interpretative effort. It, therefore, does not extend to a non-transferable Effective Cause derived from the *Qur-ān* and *Hadith.* Such an Effective Cause can validly form the basis of a Derivative Legal Principle, is a proposition which finds unanimous acceptance among the interpreters. A non-transferable Effective Cause proved by the *Qur-ān* is TRAVELLING which is exclusively found in case of TRAVELLERS only. So a distinction is to be drawn between transferable Effective Causes and non-transferable Effective Causes. Non-transferability may arise from the exceptional nature of the circumstances or events to which it exclusively applies.

Rational Co-relation between Effective Cause and Operative Orders ('Illat-Hukum)

A. Rational relation between an Effective Cause and an Operative Order is indispensible for its validity. Hence, that characteristic which is capable of being treated as an Effective Cause, for its reliability indisputably needs an argument or testimony provided by the law giver.

The rational relation may be of various degrees. There must be an argument providing that the particular Effective Cause has been directly relied upon in case of the Original Operative Order.

Example: Intoxicating quality is the Effective Cause of the Original Legal Principle prohibiting the consumption of wine, as found in the Message:

O ye who believe!
Approach not prayers
With a mind befogged,

Until you can understand
All that ye say,--
Nor in a state
Of ceremonial impurity
(Except when travelling on the road),
Until after washing
Your whole body. (4:43)

Likewise, it is stated in a Tradition that: 'Everything which intoxicates is wine and every wine (every intoxicant) is forbidden.'[25]

This kind of co-relation is of the highest rank from the point of view of reliability, and is technically called *Reasonable and Highly Effective (Munasib Muather)*.

B. It is necessary that the Law Giver testifies that though a particular Effective Cause did not form the basis of an Operative Order directly but it has been directly relied upon in case case of another Operative Order of the same kind. For instance, 'Minority' is the Effective Cause of the rule that wealth of a minor is under the control of the guardian till he/she attains the age of maturity. The Guidance Sure directs that:

Make trial of Orphans
Until they reach the age
Of marriage; if then ye find
Sound judgment in them,
Release their property to them;
But consume it not wastefully,
Nor in haste against their growing up. (4:6)

Imam Abu Hanipha relying upon this Effective Cause extended the rule of guardianship to the marriage of the minors. He equated guardianship of property with guardianship in marriage.

C. The Law Giver testifies that the Effective Cause of a particular kind has been relied upon as the basis of an Operative Order relating to a matter of the *same nature*.

Example: 'Travelling' is the Effective Cause of granting certain exemptions from the application of the requirements laid down by the Original Legal Principle which has been relied upon to permit the joining of two prayers. Imam Malik equoting rain and travel has permitted the joining of prayers because of rain also. However, the Majority of Jurists rejected this argument and strongly castigated Imam Malik for equating rain and travelling. Such drawing of inferences is nothing but misuse of the rules of interpretation in the sight of the Majority.

D. Where there exists the confirmed view of the Law Giver supported by relevant and proper arguments that an Effective Cause of a particular nature and kind has been relied upon as the basis of an Operative Order of the same kind. Such an Effective Cause could be extended to Derivative Operative Orders.

Example: The food partially eaten by a cat is not forbidden and the Effective Cause is the fact that cats so frequently visit a number of homes. In the absence of an exemption of this kind much hardship and trouble would have been caused to the people. Thus, such an exemption was justifiable as it removed hardship of a serious kind. For the same reason, i. e., Effective Cause, the baring of those portions of body which, as a general rule, could not be bared before a stranger can be validly shown to the physician, whenever the treatment required such baring. Thus, circumstances connected with an Effective Cause is a relevant factor in extending it to other Derivative Operative Orders. All the preceding three (B,C,D) Effective Causes are almost of the same category from the point of view of reliability and are technically known as '*Reasonably Effective' (Munasib Mulaim).*

E. Where a particular Effective Cause is neither confirmed as reliable nor declared irrelevant by the Law Giver, difficult questions of interpretation arise. The following example may be noted:

Example: The expiation (Kāffarah) of intentionally violating a fast, is either the freeing of a slave or keeping fast for

two months continuously. Fasting is onerous than granting the freedom to a slave so far as personal comfort is concerned. However, freeing the slave requires higher sacrifice by the individual becaue, 'greed is a very strong trait of humans.' Hence freeing a slave will be preferred as expiation in case of rich persons. The purpose of repentence and expiation is to make a violater realize his folly. Such Effective Causes are technically known as '*Reasonably Expedient' (Munasib Mursil)*.

There is a difference of opinion, amongst the eminent jurists about the acceptability of the Effective Cause known as Reasonable Messenger. Shawaph' and Ahnaph reject it, but Malkia and Hanabila consider it reliable. Malkia have founded the principle known as Reasonable Policy (Musalih-e-Mursila) and treat it as a permanent 'source' of Islamic Law.

Distinction Between Policy and the Effective Cause (Hikmat-'Illat]

The details aforementioned clarify that for an Effective Cause it is necessary that it is based on a characteristic which is explicit, defined and relevant. The one which is neither definite nor explicit but is relevant is treated as the 'policy'. Policy is that expediency which is the raison d'eter of the basic tenets. It is implied and, therefore, it is not easy to define it. A proper appreciation of policy, like perception of an Effective Cause, is an extremely tough job. For this purpose ingenuity and discernment are not by itself enough. Expertise and an insight into the subtilities of the sagacity of Prophethood is necessary for this purpose. The companions who were endowed with ingenuity and discernment learnt their lessons directly from the Apostle of *Allah* about the purposes and policy of the commandments. Thereafter, those who drew inspiration and knowledge from the companions acquired knowledge and understanding of a very high order and had a good perception of the policy of the various injunctions.

Policy is mostly implicit and it requires a lot of effort to precisely comprehend and state it so that people may understand. Moreover, because of its latent nature it is quite possi-

ble to commit grave errors as regards the persons and matters which it may actually cover. In case of an Effective Cause it is compulsory that it should explicitly indicate persons, things or matters which it covers. Ordinarily policy (Hikmat) is not utilised as an Effective Cause ('Illat).

Hadrath Shah Waliullah[26] informs us that:

> It is not proper to use policy (Hikmat) or expediency (Maslehat) as the foundation of analogy. Analogy should be based only on an established Effective Cause, as only such an Effective Cause could be the basis of an Operative Order.

However, where the policy does not suffer from the above-mentioned disabilities, it can certainly take the place of an Effective Cause.

Beher-ul-Ul'wm Abdul Ali[27] precisely stated this rule in the following words:

> If the policy is express and capable of being found in all matters covered by the relevant Operative Order and is well defined, so that such ordering may continue, then, the corelation of the Operative Order and policy is not only lawful but obligatory, because in such a situation there is no impediment which may be taken as a prohibitive or negative 'symbol'.

Hanabila maintain that *policy* can be employed as an Effective Cause without any restriction or condition. They argue that when there is consensus on the point that no order is devoid of policy and the foundation of every Operative Order is invariably policy and expediency from which the Effective Cause is inferred then there is no reason as to why policy and expediency may not be treated as an effective cause, notwithstanding the fact that it is defined or not. A large number of such uses of policy are found in the analogical deductions of Ibne Timii" and Ibne Qaiim.[28] The difference between *policy* and *effective cause* can be appreciated by noting some relevant instances as given below;

Example I: The effective cause of the right of pre-emption is a share in the property, and the policy (Hikmat) is the removal of inconvenience of the neighbour which could reasonably be assumed whenever a stranger is introduced as a neighbour. Obviously, such difficulties are not invariably produced by the introduction of a stranger as neighbour and often it is beneficial to all concerned. But this factor could not be taken as the Effective Cause because of its uncertain nature. Hence, the Effective Cause of the right of pre-emption is not the production of inconvenience but the sharing of property.

Example II: The Effective Cause of the principle of shortening of prayers is 'travelling' and the policy is the removal of hardships. However, such hardships are a common feature where an exertion is involved e.g., iron smiths, carpenters, and labourers. If 'policy' was assumed to be the Effective Cause, then it would have been necessary to grant concession irrespective of the fact whether a person was a traveller or not. Indisputably it would have been illogical, that is why 'travelling' and not 'hardship' is the Effective Cause of the permission of shortening of prayers.

Example III: Safety of life is an established policy, and a number of legal principles have been designed for promoting and preserving this established policy. But if it is treated as an Effective Cause, it will violate many legal principles e.g., Jihad or fighting for a just cause. (Though, in fact, fighting for getting rid of tumult and oppression by itself secures safety and welfare of the people.) Obviously, such a position is untenable as fighting is prescribed by the Grand Qur-ān.

Hanabila, who treat 'policy' as Effective Cause and do not very much believe in putting restrictions or conditions in such cases. They counter every objection with arguments strengthening their own way of interpretation by well-organized strong reasoning. (To know the details and the distinction, books on Islamic Law may be consulted. A discussion here is purposely omitted. The length and complexity of discussions being beyond the scope and purpose of this study.)

In the deductive interpretation Analogy is the only method of inferring Operative Orders which is equally acceptable to the four leaders of the main streams of 'Islamic Legal Thought'. Analogy is capable of providing that variety and quantity of legal rules and regulations which are needed by every developing human society. The four leaders of jurists have some minor difference of opinion which are not very significant. They are in total agreement about the validity and efficacy of analogy in solving various questions and problems. However, the people of the Manifest (Ẓāhiry) reject analogical deduction as a source of law. This difference is reflected in the treatment of various controversial legal issues.

Examples I: The question, as to the things to which legal principle of the prohibition of USURY applies, is one such matter. The Prophet[29] pointed out six commodities, (gold, silver, salt, wheat, barley and dates). These products whenever sold in exchange of its own kind, for less or more attach the rule prohibiting usury.

The majority of jurists do not accept the view point that this enumeration was exhaustive. They assert that all other products, where the Effective Cause was same, shall be included in this list. For instance, all other grains like rice, gram, millets and other minerals and substances of a like nature. According to their point of view, where the Effective Cause is common, the rule prohibiting usury shall apply.

Example II: Intentional consumption of food during a fast in the month of fasting makes it obligatory to repeat the fast and pay expiation by way of atonement. This dual liability rule of expiation is laid down by Ahnaph and Malkia.

However, according to Hadith, the liability for expiation applies only to the violation of a fast where a person had sexual relations with his wife during the period of a fast.[30] But the said jurists equate sexual intercourse and eating, drinking etc. and on the basis of this analogy prescribe dual punishment. However, the people of the Manifest with regard to the violation of a fast, follow the legal doctrine that, what is expressly

provided excludes that which is not provided and reject the analogy as a source of law. They hold the view that the rule of expiation only applies to the violation of a fast by sexual intercourse. Shawaph' and Hanabila also hold the same view but support it by arguing that the rule of expiation in case of sexual intercourse during a fast is based on the gravity of the offence committed by a believer. Thus, dual liability rule is exclusive in its application as the Effective Cause is non-transferable (Qasira).[31] Ahnaph and Malikia maintain that both the participants have to repeat the fast and also pay expiation for atonement (Kaffārah). However, once again there is a dispute in as much as Shawaph' maintain that the rule applies only to the male while the female carries no such responsibility. This is so because the Tradition expressly relates to the husband's liability only.

The people of the Manifest agree, while Imam Ahmad is reported to have expressed both views.[32]

Example III: There exists unanimity among the Jurists, that fosterage gives rise to certain prohibitions. The majority insists, that, to establish prohibition it is enough if the milk of the foster mother reached the stomach of the child and breast-feeding is not compulsory. The people of the Manifest maintain that fosterage will produce prohibition only in case where the breast-feeding was the process by which the milk reached the stomach of the child. However, the fact is, that, the Effective Cause is based on the fact that milk constitutes substance for the child. Hence, in whatever way the feeding is done, it will give rise to prohibition on the ground of the resultant relationship of fosterage (foster mother).

Ibn Hazam Zahiri[33] observes:

> Only that foster relationship creates prohibition which arises out of breast feeding (suckling of a child by a woman) feeding in other ways is not enough.

Example IV: When a husband says inequitous words to his wife. (Zihar), the wife is prohibited to her husband till expia-

tion by way of repentence is fulfilled. The expiation in this case is continuous fasting (daily) for sixty days or feeding of sixty indigents. The majority of Jurists holds the view that any kind or combination of words which is similar to the formula used during the days of ignorance i.e. '*you are for me like the back of my mother,*' will be enough to create prohibition e.g., '*you are for me like the back of my sister/daughter,*' or that '*you are for me like the stomach of my mother.*' However, the simile must relate to women who are prohibited in marriage to the person who utters such shameful and unjust words. The Manifest's, however, construe it strictly and insist that the prohibition will arise only where the exact formula i.e., '*you are for me like the back of my mother*'/, had been used.[34]

Example V: There is consensus of opinion about the rule that use of utensils of gold and silver for the purpose of serving meals is prohibited. But the majority of Jurists extends this prohibition by analogy to all the uses of gold and silver (as ornaments or the frame of spectacles or the case of a watch or watch strap etc.). The Manifest's confine the applicability of the rule of prohibition only to the use of gold and silver for serving food.

However, it may be noted, that though Ibn Hazam Zahiry and others do not accept analogy as a source of law but it does not mean that they always take a stand different from that of the Majority. Often both reach the same conclusion, but through different methods of interpretation e.g. the punishment is eighty lashes in case a male who launches a charge of infidelity against a woman but fails to establish four witnesses. However, no punishment is expressly provided in case where such a charge may be launched by a wife against her husband but fails to produce four witnesses.

The Majority extends the rule to women also equating the two sexes. Ibn Hazam Zahiry, however, assumes such a word 'as addition' (Mahzūph) which makes this rule equally applicable to men and women both. Thus, Manifest's add the word 'genitals' as the 'assumed addition'. They render verse Four of Sura *Nur*:

"And those who launch a charge against sacred genitals." (24:4)

Obviously, these words equally apply to both the sexes. But others reject this method and render verse Four and Five of Sura *Nur* as :

And those who launch
A charge against chaste women (Almohṣināt)
And produce not four witnesses
(To support their allegation),
Flog them with eighty stripes;
And reject their evidence
Ever after : for such men
Are wicked transgressors;
Unless they repent thereafter
And mend (their conduct);
For God is oft forgiving,
Most Merciful. (24:4)

Juristic Preference (Istehsān)

The technical term 'Istehsān' literally means '*to treat something as better and preferable to another*'. The word juristic preference is used when a jurist considers an opinion, view point or ruling as better than others and hence preferable. The term Istehsān has been defined in many ways by the leaders of different streams of Islamic Legal Thought. The preferred definition of each of these streams of legal thought is given below:

(a) Abul Hasan Karkhi (Hanaphi)[35] defines Istehsān (juristic preference) as:

"(In case of) the problems and issues under consideration are covered by an order found in the precedents relating there to, which is abandoned for a strong reason in favour of an order contrary to the existing one."

Ibn Rushd (Maliki)[36] has defined it as:

"Where one order based on analogy suffers from excess and exaggeration, then another Operative Order is preferred in those cases where some valid reason to abandon analogy is present."

Ibn Qadama (Hanabila)[37] defines *preference* as:

"On the basis of the presence of a special argument (derived from *Qurān* and *Sunnah*) an Operative Order applicable to a problem is separated from its precedents."

The necessity of juristic preference arises because human affairs and policy considerations are practically of an infinite variety incapable of being covered by legal rules devised at any one time (to regulate and control them for ever). The need is felt before the Operative Orders are evolved to meet them at any one time in a particular society. *Time changes are sometimes so radical that even analogy inspite of its long reach is hardly sufficient to tackle them effectively.* In such a situation the removal of difficulties to keep the affairs of Muslims on the straight path becomes necessary. The Jurists are thus compelled to abandon an Operative Order based on analogy in favour of another. Such an action is taken to provide a suitable Operative Order which takes into consideration the change in circumstances, nature of subject-matter and problems of enforcement. Such rules are comparatively more beneficial and easier to obey. The quality and relevance are the decisive factors in the adoption of an Operative Order derived through another method of interpretation:

Istehsan, denotes the rejection of analogy in favour of that which is more favourable to the people as such.[38]

Istehsan, is to provide respite and accommodation in those aspects of human affairs which equally affect all the people without any distinction of rank and position.[39]

Istehsan, is to find out a way to provide convenience and comfort.[40]

Kinds of Juristic Preference

Juristic preference is of four kinds whereby the jurists prefer an operative order on the basis of a legal argument and give it precedence over an analogical Operative Order. This reasoning or argument is technically known as 'authority' of Juristic preference.[41]

(a) The authority is provided either by the Holy Qur-ān or the precepts and practices of the Prophet[42] e.g., sale of future property (Bai'-Salam) ought not to be valid as the existence of property at the time of the transaction is necessary, as a general rule of law. But as the Prophet declared such a sale as valid, the analogy stands rejected.

(b) The authority must be either *custom* or *usage* prevailing amongst the members of a society.[43] e.g., whereafter the fixation of the price an order is placed for the manufacture of a pair of shoes or where a person takes an oath not to eat meat and thereafter eats fish instead of meat. In both these instances analogy is superceded by custom or usage.

(c) 'Necessity'[44] is an important authority for juristic preference and plays a vital role in the evolution and adoption of a large number of rules.

For instance: where property is lost by the custodian inspite of the due care taken for its safety, no liability can be imposed on him for such loss. This rule shall apply to other similar situations by way of analogy. However, it has been given a wide berth in case of persons who provide services to others such as a washerman, tailor, cook etc. All such professionals who provide some service to the public shall be liable for any loss caused by them. Likewise when a well or tank is rendered filthy then after proper cleaning the water drawn therefrom will be considered clean and pure, inspite of the fact that the possibility of filth being still in the well, is not compeletely ruled out.

(d) 'Latent' analogy[45] may also form an authority. Where an Operative Order based on analogy covering a controversial

issue produces difficulty or an apprehension of such difficulty then some legal device is discovered to issue an Operative Order contrary to analogy. It is technically known as latent analogy (Qayas-e-Khafi).

Analogy is divided into two kinds:

(a) *Patent Analogy*[46] (Qayas-e-Jaly): Where the Effective Cause is explicit and is Known as Analogy (Qayas).

(b) *Latent Analogy*[47] (Qayas-e-Khaphi): Which is known as Juristic Preference (Istehsan).

Examples: If the animals whose meat is forbidden, violate some substance (eat a portion of it) then its consumption is also forbidden according to the analogical Operative Order. As a matter of principle this Operative Order should also apply to the birds of prey. But a fine distinction is drawn between animals and birds. It is argued that as the birds use their beak which is nothing more than a bone (a bone is considered pure unless some filth is there) while animals who prey upon other animals use their mouth for eating. Therefore, anything violated by a meat-eating animal will be prohibited. Consequently, the analogy of birds cannot be applied to meat-eating animals for whom another rule is necessary. This need is fulfilled by Juristic Preference.

Further the established rule is that a debt may be received by a representative of a creditor whenever duly authorised by him. But this rule cannot be extended to cases of the trustees with regard to something which is placed in their custody by way of trust. This is so because a fine distinction is drawn between the two. In case of trust "*same thing is to be returned which was placed in the custody of the trustee*" while, in case of a loan, it is not necessary. Therefore, a mistaken or unlawful delivery of any trust property will cause an irreparable loss while in case of debts no such difficulty arises. Hence, matters of trust will be dealt with by juristic preference and the rule which so emerges is, that, any property given in trust or depo-

sited with the custodian cannot lawfully be delivered to a representative of the depositor.

Thus, Juristic Preference ought to be confined to two factors, analogy and necessity or absence of an alternative.

The two may be termed as, (a) Analogical Juristic Preference[48]; and (b) Juristic Preference necessitatem[49] (arising out of necessity). Juristic preference as such will be the criterion only in those cases where analogy could not be used because it fails to provide a relevant appropriate Operative Order. For instance: where Zaid claims that a particular property was mortgaged by the possessor to him and proves the same by producing witnesses and simultaneously Baker also forwards a like claim and proves it likewise. Then the question will be as to whose claim be accepted? Obviously the question of preference does not arise and the claims of both shall be rejected as false and mischievous on the basis of analogy.

Imam Shaph'y and Juristic Preference

The works of Imam Shaph'y contain instances of all types of juristic preference like custom, necessity and text. Likewise, he accepted analogy as a source of law.

Inspite of these facts he vehemently denounced juristic preference as a source of law. He observed that:

> Whoever employs Istehsan (Juristic Preference) creates new Shariah (Islamic Law)[50] or interpretation through Istehsan is nothing but one's own notions of right and wrong, whereas following one's ownself is not prescribed.[51]

Probably, he could not tolerate the literal sense of the word Juristic Preference which apparently shows that one's own notions find an expression therein. Secondly, its very extensive utilisation by Ahnaph convinced him that it was nothing but an abuse of the permission to complete the body of law required by the society by means of interpretative effort. There appears to be no other reason for the anomalous situation of

denying the name while accepting the substance of juristic preference.

For this reason Ibn Sam'ani stated that:

"If Istehsan is that which a person prefers without supporting arguments, then it is Void and nobody accepts it. But if Istehsan means the rejection of an argument for a stronger argument then nobody denies it."

Another Shaph'y Jurist observes that:

"The truth (true principle) is that which Ibn Hajib expressed and Amidi indicated that disputed (Mukhtaliph Phih) Istehsan does not exist".[52]

Hadrath Shah Waliullah[53] denounces Juristic Preference and considers it an unlawful intrusion in the domain of *Dīn*. However, he confines this condemnation to 'free opinion' and to those instances where the regulatory rules and principles have been grossly violated. His observation that:

"From the subtilities of the law-making explained by us some may be grabbed and then according to policy understood by intellect (free opinion) precepts be laid down".
itself supports the view.

The realistic view ought to be that real life realities require continuous resolution of problems and controversial issues which inevitably arise in every society on a large scale and are in fact of an ever-changing nature. Resolution of problems is thus necessary and it is not material whether it is done by the use of Juristic Preference or by any other rule of interpretation. A society of Muslims if refuses to do so on its own, promotes others to solve the problems according to their own notions. Nobody can impede the march of Nature. Hence it is the most solemn duty of the believers to provide an institution which continuously provides the necessary law to meet the changing needs of the society.[54]

Rationem or Rational Reasoning (Istidlal)

Rationem (Istidlal)

"Is that method of (drawing inferences) which does not depend upon the Texts, (The *Qur-ān* and precepts and practices of the Prophet) consensus and analogy."[55]

This does not particularly belong to a single method of interpretation and includes several methods which do not relate to the Holy *Qur-ān*, the precepts and practices of the Prophet, consensus, patent analogy and latent analogy. Jurists have evolved certain technical terms to regulate it. They are evaluation in presentii (indication as to the right answer), (Istehsab-e-hali); Interdependent (Talazum Bainul Hukmain) basic tenets and operative orders; and Impeding Similarities or dis-similarities (Ta'ariz *Ishba*).

Evaluation in Presentii[56]

Evaluation in presentii (Istehsab-e-Hal) is defined as:

(a) "Continuance of the application of an order (precedent) in the present and in future, or its rejection on the ground only that it did not exist in the past, in the absence of an argument proving its change."

(b) "Whatever rule or precept is proved to have existed in the past is treated as root and the same order is issued to the situation under consideration, till a proof rejecting it is found."[57]

In short, the pre-existing law (precedent) shall continue to operate till such time that a valid argument to the contrary is found, or that the pre-existing condition shall be presumed to continue unless an argument to the contrary exists, and the pre-existing order shall apply in present and future, only because it existed in the past till an argument to the contrary is established. So long as there is no argument to the contrary the pre-existing laws shall continue to operate. Obviously this method of reasoning will be effective in case of such operative order

which was proved by reasoning in the past, but now a doubt about its cessation or declination has arisen. For this reason... treats evaluation in presentii as the last basis of 'phatwas' and observes that:

"Evaluation in presentii (indication as to the right answer) is the last basis of an edict or ruling whenever a Muphti (one who issues edicts) is asked to give an order, then a search for it must be made in the Book, the Sunnah, consensus and analogy in that order. Whenever not found therein it should be derived by evaluation in presentii."[58]

Evaluation in presentii is of the following five kinds:

1. *Permission* (Ibāhat): In matters of a beneficial nature the governing principle is permission while in case of those which cause loss or hardship, the principle is prohibition. This principle will be effective till a negative argument is found.

2. *General Applicability:* ('umwmiit): A rule of general applicability shall retain this characteristic till such time that a valid argument for its restricted application is established.

3. *Logical* ('Aqly): The characteristic (effective cause) which is the proof of an order shall continue till some argument provides a proof to the contrary e.g., for ownership the proof is the marriage covenant; the prohibition of marriage of married women is the marriage covenant (Nikah), and the two shall subsist till something which destroys them occurs i.e., the marriage is dissolved.

There is no conflict of views among the jurists regarding these three situations.

4. *Evaluation of Consensus* (Istihsab-e-Ijma'): Where there is consensus among the four leaders of (juristic thought) the interpreters about a particular operative order which depends upon the existence of certain specific circumstances, and a change occurs therein, hence a conflict arises therefrom, then in such a situation there is difference of opinion amongst the jurists.

Example: In the absence of water, ablution by clean dust is an established principle as a commandment to this effect is found in the Message. However, in a case where water becomes available during the prayer, the question will be whether ablution with water before continuing further performance of prayer will be necessary? According to the rule of Evaluation in Presentii the prayer shall be valid without a fresh ablution until it is proved by an argument that continuation of such prayer after the availability of water was not valid. The majority (including Imam Shaph'y) do not utilise Evaluation in Presentii for the purpose of rational reasoning unless there exists analogy, or some other argument does not prove the equation of the condition before and after the water becomes available, because consensus about one condition is no authority for consensus about the next condition.

5. *Baseless or Illogical* ('Adam Aṣly): It denotes denial of a matter the esistence of which logic and wisdom negate and the law (Shariah) does not provide any proof of its existence. It is actually a case of void *ab-initio*., e.g., a person files a suit for the recovery of a loan but fails to substantiate his claim, then, the person against whom the suit was filed shall not be held liable. The rule is that one is not liable to pay the principal amount of debt unless the same is proved against him. Absence of proof is immunity from debt.

Malkia, Shawaph' and Hanabila accept this method of reasoning but Ahnaph treat it as a (Hujjat-e Waqaya and not Hujjat-ee Mojeba) i.e., securing existing rights but does not prove new rights.

Example: Where the whereabouts of a person are not known then he will be presumed to be alive (unless proved dead) and shall enjoy his rights in the present as well as those which may arise in future. This is the view of the above mentioned Imams. However, Imam Abu Hanipha holds the view that such a person shall be entitled to his present rights but shall have no right to future rights.[58a]

Some other principles are derived from the Evaluation in Presentii (Istihsab) which are discussed hereafter:

I. The governing factor is the preservation of the prior condition, so long as it does not change. II. In goods or other substances the decisive element is permission. III. In case of an obligation the crucial element is hardship and the freedom from one's duties. IV. True belief is not destroyed by a doubt e.g., a person believing that the day has ended breaks his fast but then doubts are raised about the fact of correct time, his fast will be void. But where a person takes the permitted last meal before the day begins and thereafter some doubt arises about the time factor, then inspite of such doubt the fast will be valid.

Interdependent Orders (Talazum Bain-ul-Hulkmain)

The two orders are interdependent where one cannot exist without the other. This characteristic imparts such orders such probity that this relation of inter dependence is permitted even where no special effective cause exists for it. According to the jurists such inter dependence shall exist where, (i) This relation is found between two positive sentences and there exists equality also and they are inherently indispensible for each other. Such as: "A person entitled to pronounce divorce can also express Zihar (where the wife is equated with the back of one's own mother)", (ii) This relationship exists in two logical sentences e.g.,

> "Ablution with clean sand is not proper without specific intention, therefore ablution with water will not be proper without specific intention." This is so because in certain cirumstanas the former is treated as a substitute of the latter.

However, Imam Abu Hanipha disagrees with this view and maintains that 'specific intention' is necessary only in case of ablution by clean sand. (iii) Where the relationship is between two sentences, and one is positive while the second is negative, such as" "something which is permitted could not be prohibited." (iv) Where first sentence is negative and the second is positive, such as: "something which is not permitted is prohibited."[59] Malkia and Shawaph' have used this reasoning extensively while Ahnaph use it sparingly.

Impedient Similarities (Taraz-Ishba)

Where conflicting and similar situations pre-exist and the new situation could be treated as common to each of them, then the difficult question which is thus faced is how todiscover with which of them it should be combined? Imam Zafer states that certain limits are implicit in the rule itself e.g., 'I have studied the Book from the beginning till the end.' (Alma'ida Section 2) obviously the last part is also included in the 'study. But sometimes limits are not implicit in the word used to signify.' the matter so limited e.g., 'keep fast from the first light of the day till night.' (2:187). Here night is not included in the limits of a fast.

The existence of the above two has created a doubt about the true import of such sentences, such as, 'Wash your hands upto elbows.' Here it is doubtful whether elbows are also to be washed, but as a 'doubt does not prove anything', the elbows will be excluded from the washing. (Some persons have attributed this view to Imam Zafer).

Imam Abu Hanipha rejects this type of rational reasoning and declares that washing of elbows is compulsory.

Some Other Methods of Interpretation under Rationem Principle (Rational Reasoning)

A number of rules for drawing inferences have been evolved by the jurists under the principle of rational reasoning which are used rarely:

1. Absence of effective cause shall be treated as a proof of its non-existence and this in turn shall be taken as a proof of its non-existence of an order. Because absence of an effective cause or argument is indispensible or necessary for non-existence of an order.

   To pass an order in such a case is contrary to the rule of high probability whereas in case of doubt (absence of conviction) it is binding in action to proceed on the basis of

probability. The Majority of Jurists rejects this method of rational reasoning while some jurists follow it.

2. *Rationem on the basis of a Temporary Effective Cause:* Although the cause is non-permanent but acquires this quality by combining with another differential element (which produces a difference) e.g., where a man touches the private parts then Shawaph' declare this act as enough to violate an ablution because they equate it with the state when a person is answering a call of nature. Ahnaph reject this view and do not accept this method of rational reasoning.

3. *Order Proved by Inductive Reasoning* (Istaqrai Hukm): It denotes a case where after considerable research a generel principle is proved according to the rule of intrinsic value on the ground that the order was proved in all or some details. For example, Shawaph' consider 'viter Prayer' as optional because it could be performed on a means of transportation and it is established by researches that such prayers are not binding in action. Some Ahnaph have also recognized this method as valid though the said prayers (Viter Prayer) are declared by them as binding on the basis of another rule of interpretation.

There are other ways of rational reasoning but are omitted here because of the length of such discussion and the limited parameters of this study.[60]

The Rules of Preference : The Different Methods of Drawing Inference:

Here some rules relating to the cases of conflict between various methods of drawing inferences may be noted. When a rule is proved by any one of the rules known as Analogy, Juristic Preference and Rational Reasoning, then no difficulty is encountered. But in case of conflicting orders arising out of the application of two or more of these rules it becomes difficult to prefer any one of them. For this purpose a couple of specific methods have been developed by the Jurists. They are: (a) Where the two methods of deduction are of the same

value then no preference could be given to either of them; and (b) Where preference is given on the basis of the intrinsic value to a particular method. In case of conflict the decisive factors which determine the preference are:

i) *Probative value of the argument:* One of the methods will be chosen on the basis of the degree of influence it asserts in the relevant event or issue e.g., where juristic preference and analogy are involved then the argument or proof provided by the two will be examined from the view point of probative value. Thus, strength of the argument will determine precedence.

ii) *Probative value of the characteristic:* The applicability and proof of the charactristic which constitutes the effective cause (argument) will be examined carefully to determine the soundness thereof to prefer a particular order.

Example: The problem is of the fixation of the intention of fast during the month of fasting. As the question of fixation of the month of Ramzan (fasting) has already been decided therefore the fixation of intention is not necessary. This quality is supported by a higher proof as compared to the obligatory nature of fasting. Because in all such situations where the rule is determinable e.g., trust property, wealth grabbed against the wishes of the owner etc., the intention is immaterial.

Shawaph' hold the view that in case of 'intention' fixation of the month of fasting is necessary because fasting is obligatory and for this reason they equate it with 'no-fasting' (non-performance of the duty of fasting). As fixation is necessary in case of 'no-fasting' it will be necessary in case of fasting also.

iii) *Majority Principle:* (Kathrath Usūl) Where the subject of a rule of analogy is one while that of the other are more than one shall be preferred. For instance, in case of rubbing the head by wet hands (Massah) it is not required that it should be done thrice because it is equated with ablution by clean dust and earth which does not require rubbing more than once (same rule applies to rubbing of the plaster cast and leather socks).

But Shawaph' insist upon three rubbings as they draw this rule of analogy with reference to washing which is required thrice to be valid.

iv) *Non-existent at the time of non-existence:* ('Adam 'Adam Key Waqt). Where there are two such analogical deductions where in case of one when effective is found then order is also found and where no effective is found then the order also does not exist. Whill the second one is such that when effective cause is found then the order is found, but it is not true that absence of effective cause means non-existence of order also. In such a case the former shall take precedence over the latter.

Example: In the matter of rubbing by wet hands, repetition is not required by *Sunnah*, because where rubbing is omitted (face and hands) then repetition is required by *Sunnah.* Shawaphy' believe that repetition is *Masnoon* (required by Sunnah) because it is a necessary ingredient. But it does not mean that repetition of a non-essential ingredient is not 'Masnoon.' Because putting water in the nose, though it is not an essential ingredient of ablution, repetition is required by the Sunnah.

Preferred Kind (Tarjih bil Zāt)

Where there is a conflict between two priorities, one based on 'kind' shall override the one arising out of characteristics.

Example: Where Zaid had grabbed the goat and cooked the meat. In such a case the right of Bakr to recover the goat vanished. He could only recover compensation in the form of money or some other valuable commodity. Now if we consider the position of goat, it belongs to the owner. It is reasonable that the owner may take it, and also receive some penalty from Zaid. While if slaughtering and cooking are taken into consideration then they are the acts of the usurper. Hence the cooked goat must be left to him and he should pay the price and penalty to Bakr. In such a situation the goat belongs to Zaid because its characteristics have a rational relation to the act of plunder. On the contrary the right of Bakr on the basis of *kind* no more exists and his relation is now only on the basis of *ownership.*

But because goat's name and profits both have changed therefore the reality has changed and now the goat has turned into a quality. Shawaph' do not agree with this rule of priority and declare that the right of the owner attaches to the goat in every eventuality (changed condition).

(vi) *Overwhelming Similarity:* (Ghalbai Ashbah). Where there exists a number of reasons for similarity in one case then it will take precedence over the other where a lower number of reasons for similarity exist.

Example: Brother is similar to father and son both because as the two are? (Mahram) i.e., one who is not within the prohibited degree so he is. But in case of son of an uncle there are many more reasons for similarity, therefore:

(a) As the welfare tax may be given to an uncle's son, it can be validly given to the brother also;

(b) Son's wife after separation could be married to the uncle's son, so can also become the wife of the brother; and

(c) Testimony of the uncle's son is acceptable, so is that of the Brother.

For the above reasons, Shawaph' hold the view that uncle's son should be equated with father and son. Therefore, when one brother becomes the slave of another brother, he would not become free. Because if uncle's son becomes the owner, a slave brother will not get his freedom. In this situation, if similarity with father and son was to be preferred, the slave brother would have been granted freedom. Because, if these two were the owners, an order for granting freedom would have been issued Ahnaf condemn this reasoning and consider these rules of priority as non-sense, and firmly express their viewpoint by characterising preferences as irregular (Fāsid).

(vii) *Preferred Generality:* (Tarjih bil 'Umūm) *General Applicability* In a case where more than one characteristic could be

treated as an effective cause then that quality will be preferred which is of a wider general applicability.

Example: The effective cause of *usury* is the edible quality of a thing according to the view point of Shawaph'. According to them, this quality is more commonly found notwithstanding the quantum of such a thing. On the contrary, Ahnaph regard the *kind* and *quality* (measured or weighed) as the *effective cause* of *usury*, which according to Shawaph' is less common because unless something is that much, which could be mea-meaured and weighed, it will not attract usury.

(viii) *Preferred Characteristic* (*Tarjih ba 'Illate-e-Ausaph:* In case where more than one quality is capable of being treated as an effective cause, a quality capable of being delimited will be treated as the effective cause, and such determinate cause will be preferred over all others.

Example: In case of usury *edibility* and *value* will be preferred as effective cause because as compared to *kind* and *quality* they have a lesser number of qualities and could be easily determined. Ahnaph reject both these rules of preference and call them irregular preferences. These principles and rules relate to deductive interpretation or the methods of drawing inferences as mentioned earlier and it has nothing to do about the decisions of the *Criterion*, the practices and precepts of the Prophet and consensus.

Some Methods of Strengthening A Point of View (Maslak)

The jurists have used a number of devices to strengthen their point of view which deserve special notice. The four most significant ones are mentioned below:

i) To prove one effective cause another effective cause is cited and used to impart strength to one's own view point;

ii) An effective cause which proved another operative order is cited as precedent, to strengthen the proof of

the order, and justify the effective cause as suitable and relevant;

iii) By presenting another effective cause and another order as precedent, obtained confirmation for an order and effective cause; and

iv) To prove an order, the jurist, gives up one effective cause for another. In such a situation, the object is not the proof of the first effective cause but that of the order. Some jurists (Doctors of Law) rejected this method of reasoning.

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Chapter 7

Interpretationem Polititia

Expediential Interpretation or Ijtehad-e-Istislāhi

The details of expediential interpretation, where the general principle is derived from interworking spirit of law and public policy (expediency), are discussed hereinafter. *Expedential interpretation* (Istislāhi) means: 'to demand and prefer expediency'. The standard of *positive* and *negative* in *Shariah* is policy (expediency). There is not a single commandment which does not promote a particular policy or conditions it, either by direct positive action or by the removal of harm (or injury). The policy which is the standard of positive and negative in the *Shariah* (law) is defined as:

> 'The real expediency is to receive benefit and avoid losses, to secure the purposes of the *Shariah* i.e., security of life, wealth, race, wisdom (intellect) and core principles of faith (Dīn). Whatever provides perfect security to these five, will be policy, and that which fails to provide safety to them is harm (damage or injury) and its removal itself constitutes expediency.' (Muhammad bin Hamid Alghazali).[1]

All the general principles and operational orders appointed by *Shariah* (law), whether demanding positive or negative action, the object of all is, preservance of life, wealth, race, intellect and *Dīn*. A rule of conduct which is opposed to what is expedient cannot become a rule of *Shariah*. This policy is comprehended by the human mind, except in few cases. But decidedly every order is based on some policy considerations.

Deductive Interpretation is based on policy: The whole structure of deductive-inductive interpretation is founded on

what is advisable or expedient and its determinate shape is 'effective cause'. In its absence the door of deductive interpretation will be closed and inertia and stagnation will be the fate of the precepts of law (Shariah). It is of two kinds:

A. Reliable policy which is the basis of deductive interpretation (Maslehat-e-Mu'tabir).

B. Independent (absolute) policy which is the basis of Expediential interpretation. (Maslehat-e-Mursila)— The law giver has not given a legal argument either supporting it or rejecting it. Further there exists neither an operative order based on it nor any original legal principle for it on the basis of which an analogy may be drawn'.

Reliable policy has been defined by the Doctors of Law in the following words:

'Where a specific definitely reliable argument providing the proof for placing reliance on it, and to accommodate its considerations, is provided by the law giver'.[2]

In short, where the safety of the five universals is provided by a policy, and for its derivation rules and principles have been prescribed, is called as 'reliable policy'. The existence of such rules and principles by itself constitute an argument for its reliability. In the case of deductive interpretation this policy is discovered by deep thought and reflection and the employment of mental faculties of comprehension and perception. When so discovered it is transformed into the *effective cause* and thereafter analogy is drawn on the basis of legal principles so derived for providing new operational orders to meet the legislative demands of the society. Actually new situations and issues constitute an unending stream in all developing societies.

Reliable policy is of three different ranks, one placed over the other i.e., 1) necessity based policy; 2) need (wants) based policy; and 3) praiseworthy policy.

1. Rules Relating to Necessity Based Policy

It is the policy without the attainment of which the five *essentials* can neither be secured nor their continuance can be ensured.

For the safety and preservation of life, food, clothing and shelter and some other necessities of life are essential. Laws and orders for this purpose are prescribed and the rules relating to the law of equality and collective fine relate to this policy. Likewise, laws and orders for the security and preservation of wealth are laid down e.g., sales and purchases, transfer of property, inheritance, theft, dacoity, unlawful gain and the like. For the security and welfare of spiritual life appropriate laws exist e.g., charity, compulsory tax (Zakāt) and other taxes payable to the state, prayer, pilgrimage and fasting etc. For the preservation and security of the race, laws relating to marriage, dower, divorce, waiting period and maternity etc. have been spelled out. Legal (including moral) rules which are intimately connected with chastity, lewdness and the like have been prescribed. Punishments (Hudūd), stationary penalties (Ta'zirāt) and criminal laws, all relate to this policy. Preservation and well being of mental and physical health is secured through legal prohibitions relating to the consumption of intoxicants, dead meat and blood issuing forth. Evils and bad habits also fall within this category. Likewise provisions for education, discipline and other human and physical matters so essential for the development of personality and social system have also been taken care of. To this category, belong the rules relating to safety and promotion of *Dīn* (religion, faith) the ordering of good things and prohibition of evils, migration, just war (Jihād) etc. Finally, laws relating to earnings, expenditure, distribution of wealth, payment of taxes, acquisition of property by the state for common good, state and administration, treaties, immunity, sovereignty, trusteeship etc. are very clearly and definitely laid down by providing basic general tenets. Legal principles and operative orders which complete the above scheme of things also exist and strengthen and promote the achievement thereof e.g., justice and liberality in labour affairs, trust, penalty and compensation, all relate to the security of wealth. Further rules relating

to preservation of race include all such things which influence it. Likewise appropriate rules of conduct exist relating to mental health, character, religion, politics and government etc.

2. Want or Need Based Policy and Related Rules

Want based policy is one, on which though the safety and preservation of life does not depend, but they make it better or worth-living by removing harm, injury, loss, hardships and troubles etc. For example, certain concessions, like shortening of prayers, ablution by clean sand and earth and prohibited food may be consumed in case of absence of an alternative. Directions, as to the conduct of amusements, hunting and racing, as well as commands, about the payment of damages and discharge of one's duties and the like are clearly defined.

The additional rules which complete this policy and also promote its ideals exist, such as, those relating to, equality, proper dower, witnesses, evidence, mortgages, joining of prayers, prayers when a grave threat exists etc.

3. Praiseworthy Policy and Related Rules

It is that policy which takes the life and character to its highest degree and makes life more agreeable, civilized and meaningful. In the absence of such policies a person often becomes wicked and uncivilized. Instances of this type of policy enumerated hereafter be carefully noted: For example, good moral character, education, dress and address, optional fasting, charity, forgiveness, accommodation of those in distress, purity of soul, body and living quarters and the like. These affairs are entirely regulated and controlled by effective and relevant commandments. To complete this scheme of life and living, certain other directions, rules and orders have been prescribed e.g., recommendatory directions, charity and sacrifice, righteousness, rejection of all that which displeases Him.

Proper Comprehension of the Three Policies

laws, the nature of the Shariah, the phraseology employed etc. to understand the intricacies of these policies successfully. A person cannot engage himself in this art of analogical deductions and drawing of inferences unless the spirit of the Shariah and the underlying principles of law are not clearly understood.[3] (See Author's book 'Mas'ala-e-Ijtehad per Tahqiqi Nazar').

Some Rules relating to the Use of Policy

The jurists have laid down some rules for the proper use of policy considerations in the law making (Shariat-Sāzi), to maintain due balance in such efforts:

1. Necessity based policy is the basic principle and the two others are its branches, because, if the former is lost the latter two cannot remain unaffected. Therefore, it is necessary to maintain a proper balance between the three policies and in the operative orders relating to the three types of policy.

2. A decision whether something was harmful or was demanded by policy shall be made on the principle of superior arguments and predominant factors, and an appropriate operative order either demanding positive action or requiring restraint therefrom shall be issued.

3. Considerations of spiritual and temporal life shall be so adjusted that, one may not be sacrificed for the other.

4. Where there arises a conflict between policy considerations and harm and there exists no valid argument to prefer one over the other, or where the two are equally pressing, then, removal of HARM shall be DECISIVE. These policies are regarded as BASIC TENETS and if some details (Juz'ziāt) could not be accommodated then there is no harm. Those basic doctrines which are discovered by search and evaluation include various details also. The details which could not be included in such doctrines either because of some external factor or for some temporary reason and that reason falls beyond the limits of our understanding. In such a situation the preferred course is that all details should be covered by basic doctrines so far as it may

be possible so that the policy is not entirely lost or its purpose does not remain a distant goal.

Independent Policy (Maslehat-e-Mursila)

Independent (absolute) Policy (Maslehat-e-Mursila) may be defined as:

'That policy which has neither been declared by the Law Giver as reliable nor superfluous. The Law Giver is silent about it. No order supports it and no precedent exists (as an appointed original legal principle), on which analogy may be based.'[4]

It is called Independent Policy which is established because the Law Giver neither supports it nor rejects it. If taken as reliable, it will belong to the jurisdiction of deductive interpretation and if it is superfluous then it will be void on which no reliance could be placed. *Superfluous* may be illustrated by the following examples:

(a) Where a Mufti declares, that, if a person commits sexual intercourse with his wife while fasting during the month of fasting, he shall have to pay for the freedom of a slave or feed sixty indigents or keep fast for sixty days, in that order. This order is superfluous and meaningless because Shariah prefers that which benefits others compared to that which is beneficial to the person concerned. So granting of freedom should be ordered initially (this rule will not apply in case of rich persons).

(b) Where an order is passed for an equal share in the property of the deceased father in favour of the son and the daughter, on the ground that the two are blood relations, such an order is devoid of all content as it is contrary to an express injunction of the Grand Qur-ān.

The whole structure of expediental interpretation is founded on Independent Policy which is defined as:

"To design the rule of *Shariah* on the basis of Independent Policy in such a manner that the rule of order should prove the policy in the required manner".[5]

Another definition of expediential interpretation is:

"Juristic precepts are founded on the Independent Policy. In other words such policies are relied upon, on which there does not exist an appointed operative order in either *Qur-ān* or *Hadith*. But in *Shariah* some general maxims of law (Qawa'id-e-Kullia) and general principles exist, which absolutely rely upon these policies and protect them."[6]

Thus, Independent Policy is not free opinion and not supported by any principle of the *Shariah*. It is clear that it does find support in general maxims of law and a few of other general principles. Analogy and juristic preference differ from expediential interpretation only to the extent that in case of the former some specific original legal principle already exists while in the case of latter some general maxims of law and some other principles exist on which it is founded. But no specific original legal principle supports it particularly.

Some General Principles on which Expediential Inrerpretation is Based

1. Justice and Liberality

The Holy Qur-ān lays down that:

"God commands justice, the doing
Of good, and liberality to kith
And kin, and He forbids
All shameful deeds, and injustice
And rebellion: He instructs you,
That you may receive admonition." (16:90)

"Fulfill the covenant of God
When you have entered into it," (16:91)

Mohammad Mustafa Shatabi observes:

"This verse is most comprehensive for urging (all concerned) for the attainment of all good causes and for the removal of mischief."

The second verse is also full of profound ideas and expresses purpose of the beginning and the end of the whole of Islamic law and His will:

"We send thee not, but
As a mercy to all creatures." (21:107)

"Verily in this (*Qùr-ān*)
Is message for people
Who will truly worship God."

Say, "what has come to me
By inspiration is that
Your God is one God:
Will ye therefore bow
To His will (in Islam)?

(The *Qur-ān* completes guidance which confirms and corrects the previous scriptures and explains in detail the instructions for those who seek and worship Allah. The Message is Universal without any distinction of any kind and to all creatures and not only to man, the principles revealed apply universally).

The above verses establish that:

It is also a Mercy that the Prophet granted permission by express words that all efforts to achieve all policies (Masāleh ke Husool) and for the removal of all evil or harm and injury (Mafāsid Ke Daph'iye) must be undertaken. It is known that time changes also bring policy changes. In such a situation if only Texts were relied upon, it will put people to much hardship, a thing contrary to justice.[7]

The Holy *Qur-ān* ordains the doing of all that is good and directs men to strive in this cause collectively:

"...Help ye one another
In righteousness and piety,
But help not one another
In sin and rancour:
Fear God : for God
Is strict in punishment." (5:3)

"To each is a goal
To which God turns him
Then strive together (as in a race)
Towards all that is good."

"And follow the Best
Of (the courses) revealed
To you from your Lord
Befole the penalty comes."

Trustees are directed to render back their trusts (what is placed in trust):

"God doth commands you
To render back your Trusts
To those to whom they are due;"... (4:58)

The word 'trusts' refers to all the obligations which a person owes both to his fellow beings and to the Creator.

Equal Rights

"...to men,
Is allotted what they earn
And to women what they earn;

The Prophet *inter alia* declared that:

"All mankind is the
Child of Adam and

All human beings are
Brothers of each other."[8]

"Women impure for men impure
And men impure for women impure
And women of purity
Are for men of purity
And men of purity
Are for women of purity..."

Equal Rights to Share what in this Earth

"It is He who created for you
All things that are on earth;..." (2:29)

"And we have provided therein (earth)
Means of subsistence, —for you
And for those whose sustenance
Ye are not responsible." (15:20)

The Apostle of Allah declared that:

"All mankind is Allah's children and
He liketh most that person who provides maximum
benefits to His children."[9]

"O mankind! We created
You from a single pair
Of a male and a female,
And made you into
Nations and Tribes, that
You may know each other
Not that you may despise
(each other)". (49:13)

Prohibition Against Concentration of Wealth and Emphasis on its Equitable Distribution

"In order that it may not
(Merely) make a circuit
Between the wealthy among you," (59:7)

The Prophet emphasized the same rule when he said that:

"Develop my country so that my
people may lead a prosperous life."[10]

Hadrat Ali stated that

"Allah has ordained that the rich according to their means should meet the needs of the poor. If they suffer from hunger or other financial distress then it is so because the rich have not given to them their due. It is a right of Allah to do the accounting on the Last Day and punish them." (Ali bin Ahmad bin Hazam : Almohalla p. 156).[11]

There is no hardship in religion and Allah places no greater burden on a person then what he can carry. Allah wants ease and convenience and not hardship and trouble for the believers. In the matter of religion Allah has not permitted any trouble so much so that there is no compulsion in matters of religion. (22:78)

The Prophet while assigning the administration of religious matters to Hadrat AbuMoosa Ash'ari and Mu'ad bin Jabal directed them to '*secure convenience*' instead of *difficulty* and promotion of a desire to *accept* instead of *hatred* and to create favourable climate instead of *hostility* (conflicts). In another tradition it is said that : 'In the sight of Allah the most pleasing is *Din-e-Hanaphi* as it is easy."[12]

Yet, another tradition warns that Din is easy but a person who practises excess in Din it overwhelms him.

Trouble, harm, pain and distress must be reduced and a person should not be compelled to do something which he could perform by straining himself to the utmost which created problems for him.

"God doth wish
To lighten your (difficulties)
For man was created
Weak (in Flesh)." (4:28)

It is clearly declared in the Holy *Qur-ān* that Allah places burdens according to the capacity of the person concerned and no greater burben is placed on him than he can carry.

The Apostle has so precisely given us the principles applicable in this area that nothing more remains to be consulted about the regulation of human affairs.

> "Allah has prescribed duties, do not destroy them. Limits have been set up, do not transgress them. Conceal not the things prohibited and ask not about matters, where silence is adopted, as it is, indeed, a favour to you."[13]

The decisive factor in things (products) is permission (something which is not prohibited is permitted).

> "Say: who hath forbidden
> The beautiful gifts of God
> Which He hath produced
> For his servants."

> "And the things, clean and pure
> (which He hath provided).
> For sustenance."

At another place the direction is, that, eat and drink but shun extravagance or that one should be neither a spend-thrift nor a miser, but should do everything in due proportion. Loss is to be removed as the Prophet said that:

> Islam ordains : 'Neither sustain loss, nor cause loss.'[14]

There are many other general principles of this nature which form the basis of expediential interpretation. The Companions, the Obedients and jurists have all solved various issues according to the demands of politico-religious expediency which are essentially based on expediential interpretation as it is quite evident from the very definition of politico-religious expediency.

"Policy is that action which brings people nearer to the good and keeps them away from mischief. Though it might not have been done by the Messenger of Allah and no revelation desended for it (no sign was revealed for it or supports it)."[15]

Such a policy is in fact a part of faith (Dīn) and the object of the Shari'ah. Further it brings the people nearer to equity and due balance. No doubt or objection could be validly raised opposing this proposition. For decision-making under such policy considerations does not require a clear and direct proof from the *Qur-ān* and *Hadīth*. It is enough if it is supported by the general principles of the Shari'ah. Imam Shaph'y observes:

"Only that policy or expediency is reliable which is inconsonance with the Shari'ah."

However, he has not explained the nature of this 'Support'. If it denotes a policy not opposed to Shari'ah, it is a correct exposition of law. However, if it means a policy which is expressly supported by a rule of the Shari'ah then it is wrong, because any such interpretation will render the interpretations of the Companions invalid or false.

In the Shari'ah the matter of expediential interpretation requires extreme caution as its ill use will lead to violence and anarchy while its disuse is equally harmful.[16]

The Rules Relating to the Utilization of Expediential Interpretation

The leading interpreters have laid down three specific rules for the use of expediential interpretation:

A) *Atiainment of obtectives and removal of evils* :
[Jalab Masāleh-w-Daph' Maphāsid]

It denotes employment of such legal rules whereby moral, material, and policy considerations, which the society requires, are given effect to for its better ordering. Further it involves

the removal of those moral and material evils which adversely affect the interests of an Islamic society.

B) Opening and closing of gates (means or methods) :
[Fatha Zarai'-w-Sadd Zarai']

It signifies the use of such methods which promote the attainment of objectives and removal of evils. It includes the imposition of such conditions and restrictions which may be necessary for the removal of difficulties, which may arise in the realization of the deserved objectives and the removal of things which are undesirable.

C. Time Changes (and corresponding) legal changes :
[Taghauir -e-Ahkam ba Taghaiur-e-Zaman]

Changes of Rules with the change of times i.e., to change by law the pre-existing rules applicable to a particular sphere of life because of the changed policy consideration or where the old rules are no more effective to combat pernicious practices in the society.

Attainment of policy objectives and removal of evils: (Jalabi-Masāleh wa dhofa mafāsid):

We find a number of examples in the interpretations of the Companions of devising rules for the attainment of policy objectives and the banning of pernicious practices. Sometimes they introduced expediency and/or provided for convenience by restating the principles of application of pre-existing operative rules. There is agreement among the researcher that these efforts of the Companions fall within the category of expediential interpretation where the dominant factors are public expediency and welfare of the people.[17]

The Companions in a number of matters relied upon policy considerations definitely inspite of the absence of a specific pre-existing proof for placing such reliance on such considerations.[18]

Every student of history is aware of the fact that after the life time of the Prophet the Islamic society was con-

fronted with serious internal disruptions and rebellions. The unity of the Islamic society would have been jeopardized if the Companions had not taken recourse to devising rules based on policy considerations. They made the necessary changes in the operative rules dealing with various issues in accordance with the general principles found in the Text. The Companions had received instruction first hand from the Appostle of Allah and thus had the proper perception about the extent and nature to which the changing social, political and economic conditions may necessitate change in the operational rules while the foundational principles remained intact.

The Companions successfully performed the delicate but imperative job of bringing law and the needs of the society closer. They evolved operational rules to meet each and every situation. They avoided the difficulties and hardships of a rigid and inflexible application of the old or pre-existing operative rules. They took good care to ensure that the new rules and regulations were not in the least inconsistent or violative of the spirit of the parent sources of law.

Hadrat Abu Bakr Siddīq undertook the task of collecting various *Suras* to compile them in the shape of a Book containing the authentic Text of the revelations. Apostacy was dealt with by him with a strong hand and was finally suppressed. In some cases he ordered war against the Apostates while some of them were imprisoned. Some others were forgiven, while some were killed or burnt alive. The maintenance expenses of the non-Muslims needy people were declared to be a charge on the public exchequer. Consumption of intoxicating drinks was declared to carry the penalty of forty lashes administered publicly. He also laid down many other operative rules derived from the Shari'ah.

Hadrat Umar [19] took the radical step of declaring that all lands belonged to the State and Muslims were mere custodians and not owners of lands in their possession. He went to such an extent in enforcing this principle that when a person embraced Islam then his immovable property was confiscated and distributed among the non-Muslims of that locality. The

convert was paid an allowance from the state treasury to live a comfortable life. The State also undertook the responsibility of providing opportunity to earn the livelihood to all prople.

The punishment for drunkenness was laid down to be eighty lashes. On one occasion he ordered that twice the value of stolen property be paid by way of punishment.

In case of theft from government treasury he did not enforce the punishment laid down for stealing. Likewise, the punishment for stealing was not ordered where a mirror belonging to a lady of the house was stolen by a servant. He prohibited marriage and sexual intimacy during the waiting period. He acquired a pasture land for public purposes without paying any compensation. He associated non-Muslims in the administration of the country. He organized the administrative machinery and established different departments to look after different functions of the State. He organized the system responsible for the collection of Central taxes. Another very significant measure he undertook was to require all officers of the State to submit a list of their assets to the State. He also laid down the rule that if more than one person committed a murder then all members of such a party were to be punished. So one or more than one person may be killed as punishment for committing murder. This rule is not expressly found in the text but is based upon the general principle of requital. Likewise, we find examples of *Maslehat-e-Mursila* in the judgements and rulings of Hadrat Uthman and Ali. For instance, Hadrat Uthman declared that only the authentic version of the *Qur-ān* is to be followed and relied upon by the believers.

Hadrat Ali ordered death by burning in case of some Rafizies (Ghaly shi'as).[20]

The Obedients also solved various problems by employing the principle of policy considerations keeping in view the demands of expediency.

Hadrat Umar bin Abdul Aziz collected traditions on the

official level. He also provided public rest houses on various highways for the use of the travel-weary people.

Ibn Abi Laila declared that the testimony of a child shall be relevant and acceptable in disputes involving children. He was of the view that in such cases the rule that a witness must have attained the age of majority was not applicable. The application of this, rule, according to him, was restricted to those disputes where adult members of the society were involved. This exception about age and understanding of the witnesses was again applicable only to those disputes where children were involved as distinguished from adults.

Kadi Shureh for the first time ordered a washerman to pay compensation for the clothes of clients burnt in fire which engulfed his house on the ground that if the house of the client was burnt even then the washerman could recover the amount of his labour.

Kadi Shureh and Ibn Abi Laila, held the view that where a person obtained land from another for a temporary construction and a definite time was not agreed upon for delivering it back to the owner, then if the latter wanted his land back, he shall pay the price of the house constructed thereon according to the market value of the house on the date of such return of land.[21]

All these rules are based on considerations of policy and there existed no precedent covering these problems.[22]

Imam Mālik holds the view that it (policy considerations) is the firm basis of all rules laid down by expanding intellectual effort, while other Imams give it secondary importance only. Imam Mālik permitted imprisonment for obtaining confession where the allegation against the person was of either theft or misappropriation of property. Some Māliki Jurists also favoured beating for this purpose as a legitimate stratagem. Likewise the state can collect taxes by force in exceptional circumstances. Monetary punishment is permitted in case of economic crimes. Property may also be confiscated and distri-

buted among the poor where it is found adulterated e.g., adulterated *Zāfr'ān* (Saffron). Once Hadrat Umar ordered destruction of adultered milk so that no one may consume the same. Necessity coupled with absence of an alternative was recognized as a legitimate ground for the suspension of the application of normal rules e.g., where it is not possible to earn one's livelihood legitimately he can earn the same to the extent of necessity by employing any means whatsoever. To prevent misuse of the principle of '*policy considerations*' Imam Mālik was careful enough to lay down three conditions for its legitimate employment. They are:

(1) The policy consideration, must be based on realities and not on mere apprehension or imagination. The rule must be designed only to attain some beneficial purpose or to avoid some undesirable results. Thus, it must be employed only when some real evil results are to be avoided e.g., hardship and loss. However, such a difficulty must not be farfetched and unreal e.g., an apprehension that power of divorce is likely to be abused by the males hence it may be vested in the courts only.

(2) The removal of difficulties by evolving rules on the basis of independent policy must relate to the public as such or persons placed in similar situations but it should not be exclusively for the benefit of some persons of high rank and status.

(3) The rule based on policy considerations must not violate an established ruling and it should not be contrary to the provisions of the parent sources of law e.g., no rule can be laid down providing for equal share in the property of the deceased for sons and daughters.[23]

Imam Ahmad extensively used policy considerations as the basis for the rules of conduct relating to various matters. He ordered externment in case of an effeminate. He permitted death by burning in cases of sodomy. Likewise he prohibited seclusion for women where there was a reasonable apprehension that they may indulge in unnatural sexual behaviour.

Imam Ahmad in fact firmly believed that independent policy can legitimately provide validity to a legal rule and used it extensively. He resolved various issues through rules based on policy or expediency. 'Policy' may be defined as that action which promotes good and removes evil, though it was neither practised by the Apostle nor confirmed by any revelation.

Ibn Taimia defines independent policy as:[24]

'Policy' is that action which is undertaken by an authority who considers it resonable having regard to the demands of expediency though there does not exist a narrated argument in favour of such an action.

At another place 'policy' is defined by him as that law which is laid down for securing desired objectives, regulation of administrative machinery and the affairs of the people.

Its sphere of operation is not less than that of 'istislāh' and for this reason it is commonly believed that after Imam Mãlik, Imam Ahmad used independent policy (Masāleh Mursilah) on a very large scale. This view is supported by the writings of Ibn Qaim and Ibn Tamia.

Imam Abu Hanipha[25] never rejected the principle of 'policy' as an instrument for the attainment of desired objectives and to remove or prevent evil results. He in fact utilised 'Istehsān and Urf' for the resolution of such issues which actually fall within the sphere of 'Istislāh'.

For example, persons practising certain occupations were held responsible for the loss or destruction of goods placed in their custody. Further, *Ahnaph* extensively rely on 'opinion' for evolving legal rules and hence there should not be any difficulty in employing the principle of '*policy considerations*'. Speaking realistically, the only difference is that of the use of different technical terms. The approach is that if one's own terminology is capable of settling controversial issues then why another be used?

Imam Shaph'y[6] is totally opposed to 'Istislāh' but about 'Policy' Zanjani has narrated his view as:

"Imam Shaph'y considers it proper to justify rules on the basis of demands of expediency, where the basis is provided by some general principle of the '*Shari'ah*', though there may not be a pre-existing authority in the form of an operational rule'.

This is in fact '*Maslehat-e-Mursilah*' which has been defined in the preceding pages. Further Imam Shaph'y solved various issues of an *Istislāhi* nature by using analogy. For instance, he held the view that where the witnesses testified that a person had pronounced triple divorce and the court ordered separation on the basis of such evidence, but thereafter witnesses retracted their testimony, then they will be *Sureties* for the payment of *similar dower*. Further, where the woman was divorced before consummation of marriage, the same rule shall apply. Where a person had expropriated to a certain extent the property gained unlawfully then the owner shall be free to permit the continuance of such appropriations.

The actions of the leaders of interpreters stand a firm testimony for the assertion that each one of them had used the principle of "independent policy" to lay down operative rules to meet the pressing needs of the society. The only contribution they have made individually is the coining of different technical terms to describe their own manner of employing 'policy considerations' as the basis of legal rules. In fact, apart from the technicalities the differences which exist among them *are not very real*. Imam Ghazali has characterized *Istislāh* like *Istehsān* as devoid of meaningful content, but his arguments are also terminological and not very real in the final analysis as far as the net product is concerned. To obviate criticism *Istehsān* is treated as a part of *analogy* and this is also true of *Istislāh* which is likewise treated as a *kind of analogy*.

In such a situation analogy will be divided into two kinds: one, '*particular analogy*'. where the operative rule is derived on the basis of the Effective Cause, and two, '*general analogy*' where the operative rule finds justification in 'policy considera-

tions' which are solely relied upon for the resolution of a controversy.

Mr. Qaraphy Maliki has observed that:[27]

"Certain jurists not belonging to our camp reject 'policy considerations' as such but when they analyse and evaluate rulings then they treat them as the 'Effective Cause' and to place reliance upon it they do not consider it necessary that there must be some particular proof for such reliance. They consider 'reasonableness' enough to sustain such deductions. In short, something which may be reasonable and supportive is treated as 'policy considerations".

Conflict between Independent Policy (Policy Considerations) and the Texts of the Shari'ah

In the field of policy considerations the difference of opinion among interpreters comes to the fore when a conflict occurs between policy considerations and the Texts of the Shari'ah. Those who treat 'policy' as a permanent source of law, accept as valid the qualification of general texts by policy considerations. Those who reject it as a permanent source of law do not agree with this view. But as will be seen even these fellows while dealing with problems do not hesitate in qualifying general Texts by policy considerations. When they do not assign expediency permanent status then they infuse it by including it or subordinating it to patent or latent analogy. It actually makes no difference so far as the results are concerned. In very few cases minor differences arise.

Two Kinds of Texts of the Shari'ah

(a) Specific Texts
(b) General Texts

Specific Text may be illustrated by the precept of the Prophet whereby he prohibited engagement ceremony of marriage while the negotiations might be carried on with some other person. Likewise in case of sale he prohibited the conduct of business when some other person may be discussing

sale. General texts may be illustrated by the precept of the Prophet whereby he prohibited transfer of property by fraud. He also prohibited agreements of sale of the first pearl which may be taken out or the first fish which might be caught.

In case of specific texts ascertained goods or specific and definite matters are either permitted or prohibited. In case of General Texts the order to do or not to do about things of one kind of unlimited number or indefinite matters is either permissible or prohibited. According to the jurists Specific Texts provide a definite proof and argument about a purpose or objective. General Texts have only probable probative value as a proof and argument about a purpose or objective. In case of each General Text the extension and non-inclusion of certain referents (members) always remains a real possibility. Imam Mālik, Ahmad and Shaph'y follow this rule. But Imam Abu Hanipha is of the view that General Texts are also definitely reliable i.e., there is no possibility of specification. But if for some reason some referents (members) are not included in the ambit of such a text to the other members its reasoning remains probable, and the possibility of non-inclusion of some members does arise. (The details of this rule have already been explained in case of expository interpretation.

Where a conflict exists between policy and Specific Texts then there is consensus of opinion that Expediency (policy) will not be relied upon and Texts will be followed. For example, specific texts of a definite nature provides for the waiting period and maintenance of a divorce, widow and a pregnant woman. If the Policy on which it is based comes into conflict with some policy consideratians then the latter will not be relied upon. The period of waiting shall remain unchanged.

However in case of a conflict between Policy considerations and general texts, there exists a difference of opinion among the jurists.

Shawfa' do not believe in the qualification of a general text by expediency, but in case of pressing need or general need they

act differently. In case of pressing need Expediency will be followed and the text will not be followed i.e., in case of war between Muslim & Pagans the enemy forced a number of Muslim prisoners to the front. It became clear that unless an attack was launched against the Muslims the enemy could not be repulsed and it was probable that the enemy will crush the Muslims. In such a situation though the killing of a Muslim unjustly is prohibited by a specific texts but even then Muslim prisoners will be killed and the enemy be repulsed. Shawaph' neither believe in Istehsān nor in Istislāh, therefore the sphere of qualifying a general text by Expediency is very narrow with them. But because the sphere of analogy is very wide in their case and they qualify general text by analogy and hence from the point of view of result the sphere of such qualification is actually very wide. This is so because Expediency is relied upon in the guise of analogy.

According to Alghazali' in case of such expediency for which there is no definite text but there exists some reasoning for 'placing reliance upon it then the Shawaph' by using analogy have accepted such reliance.[28]

Hanabila[29] give more weight to independent policy (Maslehat-e-Mursila) and also accept the view that it has a special place in the field of politico,-religious expediency. However, inspite of all this, they do not believe that it has the capacity to specify general texts. Where such need arises, they subordinate independent policy to the principle of analogy and thereafter use latter (Qayas) for the specification of the general texts. For instance the state can compel a person having a spacious house to give up a part of it to accommodate a homeless person, the professionals could be likewise compelled to work without any excess payment in case of need and where the price rise reaches unreasonable levels the State can validly exercise power of price fixation to ensure the supply of consumer goods to the people at a reasonable rate. In all such cases the general rules are qualified to serve the ends of policy independent or otherwise. Though recourse is taken in such situations to the principle of politico-religious expediency but the net result serves the compulsions of policy.

Ahnaph consider general texts as definite and final, unlike others, and hold the view that specification of general texts by independent policy is not free from difficulty because some referents could be validly omitted from the purview of a general text only when some sound argument or reasoning supports such a view point. In such a case the probative value of the general text will become probable as regards other referents. However, inspite of this assertion, certain examples are found amongst the Ahnaph where general texts have been qualified by independent policy. For instance,

i) The general rule about the validity of a testimony of a witness is that he must have actually observed with his own eyes the event about which he is testifying. Thus hearsay evidence as a general rule is inadmissible. But Ahnaph, exclude the proof of wakf, death and lineage from the operation of the hearsay evidence rule; and

ii) The Apostle of Allah, prohibited the sale of future property but Ahnaph permit the sale of a fruit crop before the fruiting process is completed.

Hanaphy Fiqh consists of many instances of the specification of the general texts and except independent policy no other factor could be preceived as a justification thereof.

Moreover, one branch of Istehsān which means latent analogy (Qayas-e-khafi) is Istehsān-e-Zurūrat (need) which has been used by the Ahnaph very liberally and is actually based on the principle of independent policy. Thus it is quite clear that what the Ahnaph preach is not necessarily the same which they practically employ in their interpretative effort.[30] Consequently those who consider mere profession of a principle important can attribute to the Ahnaph the rule that general texts could not be qualified by independent policy. Those who accept the act and result as the true guide can attribute the rule of the qualification of a general (text) to them.

Malikia unlike Ahnaph clearly and directly qualify general texts by independent policy and are convinced of the validity of

such interpretations e.g., an alleged murderer or thief could be imprisoned or punished for obtaining a confession, though the validity of this rule could not be proved by any general text. Likewise they hold the view that a rich mother may not breast feed her children and the same rule will apply where custom or usage demands that instead of mother a foster mother should breast feed the children. This interpretative rule also does not find any support from general texts. Finally, they permit an exemption from the general rule of evidence that, 'the complainant must produce witnesses and the defendant should take an oath if he denies the case made out against him', in cases where the two may not be related to each other. In this manner they restrict the application of this general rule to the defendants and complainants who are related to each other. Hence where the two may be strangers the rule of taking the oath by the defendant will not apply.

Nevertheless some of the Malkia Jurists do not favour the fact that specification of general texts by independent policy be attributed to Imam Mālik. and for this reason have tried to explain away this reality by argumentation and clarification. But it may be carefully noted that as independent policy is neither supported nor condemned by any text the question of preferring independent policy in the face of general text does not arise. The fact is that rules which are derived from texts and the policy they promoted in certain circumstances, preferred to the policy emanating from some other general texts. Therefore, here one text is preferred to another text and the question of independent policy overriding a text does not arise at all.

Imam Najmuddin Tuwphy Hanbaly disagrees with the view of the leaders of Jurists and holds the view that:

i) A policy for reliability in law making does not require 'independence', and it will be enough as such;

(ii) Policy overrides both consensus and text and in case of a conflict the former shall be preferred; and

(iii) The status of policy is that of an explanation and

qualifier like a Hadith and it shall similarly over rule the Qur'ān.

Tuwphy (Abuzabi' Sulaiman bin Abdul Qawy bin Abdul Karim, birth 658, death 716 AH) has founded his way of interpretation on the Hadith, 'Neither the sustenance of loss nor the causing of loss, is permitted in Islam,' and has discussed the rule of policy and other interpretative issues in the light of this rule.[31]

(A detailed discussion of his views is omitted because his way of reasoning and interpretation has been roundly condemned. He is proved to be a Shia though in fact the Shi'ite way of interpretation is different.[32]

The Rule of Opening and Closing the Gates (Fateh-w-Sadd Zarī'a)

Opening the gate or taking recourse to measures designed and leading to the attainment of desired objectives is defined as:

"Something which leads to the attainment of an objective", and is strengthened by the rule of glosing the gate or taking necessary measures to eradicate evil acts which constitute a transgression of the limits set up by Allah.[33] Shari'ah has placed notable emphasis on the effective and vigorous implementation of rules and policies directed to establish this WILL and LAW by opening the gates of good and the closure of the gates of mischief.[33] Ibn Qaiim has treated this normative principle as the fourth of the Shari'ah. Qaraphy has observed:

That as the closing of gate (of evil) is binding, its opening is also binding, disapproved and permitted because the "method" adopted constitutes the "cause". As the cause of prohibited is itself prohibited the cause of binding shall be binding in action e.g., effort for pilgrimage or Friday prayer.[33]

Some Examples:

The Qur-ān

The Grand Qur-ān prescribes:

"Go both of you, to Pharaoh,
For he has indeed
Transgressed all bounds;
But speak to him mildly;
Perchance he may take
Warning or fear (God)." (20: 43,44)

This direction to deal with a wicked rebel gently clearly establishes the rule that, 'to avoid the chance that an admonition conveyed in a harsh or rude manner may not destroy the very purpose of such an effort by creating hatred.'

Ahadith: The Apostle of Allah well endowed by sagacity of Prophethood has inter alia laid down the following rules in persuance cf the aforesaid divine policy:

1. The free consent of the male and female is enough to create the bond of marriage. But it is subjected to the rules relating to public declaration, the witnesses of the sacred covenant, guardianship in marriage etc. The rules are directed to ensure a clear distinction between marriage and fornication and to prevent marriage being used as a pretext for fornication.

2. Only one leader should lead the Friday, 'Eid and Fear prayers. The reason is that plurality of prayer leaders may not create conflicts and disharmony among the Believers.

3. Inspite of the fact that a finder of goods acts in the capacity of a trustee the rule is that he must establish testimony of one witness. The object is the closing of the gate of misunderstanding and disputations.

4. A sleepy person is directed to sleep instead of continuing with his praying. The effective cause of the rule is the distinct

possibility of such a person instead of asking forgiveness may call for his condemnation and praying may not become the cause of an evil supplication.

The Qur-ān

(VI) The Grand Qur-ān provides:

"Revile not ye
Those whom they call upon
Besides God, lest
They out of spite
Revile God
In their ignorance.
Thus have WE made
Alluring to each people
Its own doings.
In the end will they
Return to their Lord,
And We shall then
Tell them the truth
Of all that they did." (6:108)

Ahādith: [34]

(VII) The Apostle of Allah prohibited the slaying of hypocrites as he did not like it to be the cause of the condemnation of Islam.

(VIII) Males were ordered to shun the company of the females in seclusion.

(IX) Solemnization of marriage during the process of pilgrimage is prohibited to avoid sex relations during the sacred ritual; and

(X) Creditors are not permitted to accept gifts from the debtors to prevent its use as a bargaining counter to secure postponement of the repayment of debts,

Interpretative Rules: the Companions[35]

(I) A wife divorced during death illness was declared to retain her right of inheritance to prevent the possibility of the deprivation of her rights on the pretext that she was divorced during such illness;

(II) Murder committed by a party of persons carried punishment for each of such persons, notwithstanding any other factor. This was done to promote the principle of equality and to deter people from joining hands to commit a crime;

(III) To eradicate the evil of drinking Hazrat 'Umar ordered the destruction of a habitation where intoxicating drinks were sold;

(IV) Hazrat 'Umar prescribed death by stoning for both the persons who undertook Halāla for a consideration and the person for whose benefit it was undertaken; and

(V) Hazrat 'Uthman undertook measures to ensure that only the authenticated version of the Qur-ān was followed by all the Believers. He directed that all people must follow the official copy of the Qur-ān to prevent the Book from becoming a source of disputations and dissensions.

The large number of instances of opening and closing of gates have been classified according to some general rules by the Jurists into four categories:

i) Where an act or omission definitely produces mischief and/or loss e.g., the digging of well on a path way at a place where a person will surely fall into it in the dark. If the well is dug on a public way, there is consensus of opinion that the act will be unlawful. If it is dug on a private path then the question of the validity of such an action will be determined by weighing the private benefit and public interest and the latter shall be preferred to the former. The rule is that private profit shall be subservient to the public loss, as 'removal of loss takes precedence over the benefit.'

ii) In case of things which rarely cause loss or mischief such a possibility will be ignored in the face of benefits arising there from e.g., certain foods which are generally beneficial and grapes and other fruits. Though wine is produced from grapes beside many other things and is certainly a danger to health, but it would not justify a ban on growing grapes.

iii) Where the probability of causing loss is quite high but still falls short of certainty, the former will over-ride the latter e.g., sale of armaments to the enemy during war. Some jurists disagree but their reasoning is not convincing.

iv) Where something in most of the cases causes loss or harm but still could not be treated as highly probable, the jurists disagree as to the rule of preference, e.g., a sale where the net result is 'usury' e.g., a person sells goods for a period of one month for rupees ten and purchases back the same for five rupees before the expiry of thirty days.

Imam Ahmad and Mālik are of the view that all such avenues which lead to the possibility of things prohibited by the Shari'ah must be closed. Imam Shaph'y and Abu Hanipha permit the same as they attach more importance to words and particulars as compared to intention and object. On the contrary Imam Mālik and Ahmad give due weight to both these factors and concern themselves with the final outcome of an act. This difference of opinion has produced a number of disagreements among the interpreters and it is used as a justification for various legal devices to ward off the application of various injunctions. It neither deserves encouragement nor a detailed discussion.

The majority[36] of interpreters have utilized the principle of opening and closing the gates of what is considered right or wrong except Zahiry Jurists. Imam Mālik has treated it as a definite normative principle and has liberally applied it. Imams Ahmad, Abu Hanipha and Shaph'y treat it as a secondary principle and have resorted to it for providing operative rules for the regulation, promotion and control of various actions of the people. Qaraphy observes:[36]

'Not only Imam Mālik but all others have accepted this rule as a valid normative principle. It is specifically attributed to the Malkia because they used it extensively.'

Qartabi observes:[36]

'Imam Mālik and his disciples have accepted "closing of gates" as a valid tenet. A number of people controvert its 'normative status', although even they have themselves employed it in case of many issues.'

Examples:

i) It is permitted, to secure the release or comforts of Muslim prisoners, in exchange of money or other commodities. Such an action does benefit the enemy but is necessary to remove a bigger evil, a lesser evil is legally permitted.

ii) In the absence of an alternative, freedom from trouble could be legally obtained in exchange of money/goods/services.

iii) Where a shopkeeper sells goods at prices considerably lower than the market price with the object of causing loss to fellow shopkeepers, then it is prohibited to make purchases from him. The reason is that he is guilty of causing unlawful loss to other traders. This view is attributed to Imam Ahmad.

iv) Helping a criminal or aiding or abetting a transgressor is an abomination as it definitely produces more mischief.

(v) An adjudicator is not permitted to decide on the basis of personal knowledge. As a matter of principle such decision making is permitted but as a matter of practice it is prohibited because of the grave danger of injustice when taken recourse to by adjudicators of questionable integrity.

vi) Loss caused by a person employed to handle bags of grain could be validly recovered from him. This rule is laid down to prevent misappropriation by such persons.

vii) A wife will not be deprived of her right to inherit property if divorced during death illness or at any time when the apprehesion of death is based on highly probable reasons. Ahnaph treat such a divorce as an *escape divorce* (Ta'suf) where it is pronounced contrary to the wishes of the wife and the husband dies during the waiting period.[37]

In short, the Shari'ah expressly permits the use of the principle of opening and closing the gates of good and evil and a large number of such instances are found in the books on Islamic law.

Time Changes and Legal Changes[38]

(Changing human and material changes bring about corresponding changes in laws and/or operative rules).

The operative rules designed to fulfill the needs of a particular situation necessarily require a change whenever the circumstances change and a different policy is required to meet the compulsions of such changes.

These changes mostly occur in the field of morals and character of the people and in the area of developmental activities. Society is an ever-developing phenomenon wherein changes in every sphere of life are universally witnessed with the passage of time. Unlike the past, present day societies are experiencing fast radical scientific and industrial advances which in their train have brought in profound changes in the life style of the people. Naturally, for the preservation of the Islamic normative principles as the mechanism to regulate and control the affairs of men. it is maintainable to make corresponding changes in the operative orders.

Hazrat 'Umar bin Abdul Aziz emphasized this reality of life and said:

> 'Instruction and adoption of new kinds of evils and injustices by the people have created corresponding legal rules (to meet them effectively).'

Azuddin bin Abdul Salam eching the same observed:

'Operative orders (Ahkām) have increased to same extent to which people have added to the affairs, policies and cautions (Siasiat, M'amat and Ahlialat)'.

Changes[39] in operative orders corresponding to the changes in human and material affairs normally assume two shapes.

i) Changes in the nature of principles; and

ii) Changes in the particulars or characteristics of such principles.

To supply that quality and quantity of legislation which is required for effective handling of the changed situations is an indispensible requirement which brooks neither delay nor denial. In may be carefully noted that in case of interpretative legal principles, changes of both the above types take place. However, in case of non-interpretative legal principles changes only occur in the characteristics which exclusively apply to the change of operational orders and no change is admissible in non-interpretative legal principles as such.

Examples of Interpretative Legal Rules

i) A debtor possesses wealth which is only enough to satisfy his debts. If he either makes a gift of such property or creates a trust (Wakf) then according to the jurists of the old, his action will be unlawful. But later jurists hold the view that such appropriations will be unlawful only when made contrary to the wishes of the creditors.

ii) Where a person unlawfully grabbed another man's property then according to the jurists of the old he will have to reimburse the loss caused thereby but could validly retain the usurfruct thereof without paying damages attributable to it. On the contrary later jurists do not draw any such distinction in the payment of damages by such a person.

iii) Where the husband has paid the prompt dower, he is entitled to take his wife to any place of his choice. However, according to the jurists of the old, the wife could validly refuse to go to such a far off and furlorn place where she will not be able to seek help in case of distress from any person interested in her welfare.

The change in the characteristics of non-interpretative precepts denotes a case where the application thereof is restricted without in the least touching the normative legal principle. Likewise a general rule may be qualified or its application may be restricted to certain specified cases. Some condition or characteristic or factor may be added to it or exceptions may be granted in certain conditions or cases. Finally, suspension of application for a certain period also falls within the category of the changes of characteristics of a precept (Hukm).

These changes do not in any manner affect the texts and the question of modification or preference to other principles does not arise. Changes will be confined to the operational level and suitable changes are effected in operative rules only within the parameters of the normative levels. Change of operative orders is often confused with the change of normative principles and this has been largely responsible for the suspicion and aversion which any suggestion of this nature generally produces amongst the Muslims particularly in the Indian subcontinent. It is wholly an unfounded fear and the myth of "hands off" policy must be exploded.

The Grand Qur-ān lays down:

When We substitute one verse for another,
And God knows well what He reveals,
Then these people say that, 'you have forged it,'
But it is not the Truth
And many out of them do not understand: (Alnahl : Section 14)

Maulana Muhammad Shabbir Ahmad 'Usmani, as an explanation of this verse informs:

"(The) Fact is, that the whole of the Qur-ān was not revealed at one and the same time. The verses were handed down on different occasions. Some prescribed rules of a limited duration and with the change of the circumstances other orders were received. For instance:

(a) In the early years of Islam slaying or fighting (the enemies) was prohibited while later on it was permitted; and

(b) Likewise in the beginning' the rule about adoration was, 'pray during the whole night or for half of it or a little less than the half, if not possible, then there is forgiveness for you. But, after a short period in Mekka itself it was revealed that, 'God is well aware that you cannot fulfil this (order) therefore, you are now forgiven and recite Qur-ān to the extent you can easily recite."

The pharaseology of the verse itself provides the answer about the nature of the change contemplated thereby in as much as the word 'substitution' has been used instead of the term 'change' (Tabdūl instead of Abdal). Substitution (Tabdūl) denotes a change where the core content or the normative principle remains untouched while 'change' (Abdal) signifies the changes in the core content or the normative principle. This explanation is given by Sheikh Muhammad Tahir Patni[40] beside others and exactly elucidates the principle of change which finds an expression in the verse aforementioned. Muhammad Murtaza'(y) Zubaidy[41] has explained the same by means of an illustration:

'Substitution (Tabdily) denotes a complete change, either in kind e.g., dirham is changed for dinar, or in qualities e.g., silver is changed into a ring.'

In short, substitution signifies the change at the operational level and the normative principle is not disturbed, while, change means the displacement of a normative principle and its replacement by another principle. In the Arabic dialect two idioms are used. They are:

"Abdalat alkhatim bil halqata"; and
Badlat alkahtim bil halqata."

The former expression is used to express substitution of a principle or thing by another different one e.g., a finger-ring is replaced by a ring, while in case of the latter the core content or principle remains the same and the shape or operational rules are changed e.g., where a finger-ring is melted and the metal so recovered is made into a ring. Thus the former is used to denote a complete change while the latter is used to demonstrate or mark the change of quality only. Both these expressions find a place in the Grand Qur-ān and clearly support this view point.

I Those who reject
Our Signs, We shall soon
Cast into the Fire:
As often as their skins
Are roasted through,
We shall change them (Badalnahum)
For fresh skins,
That they may taste
The Penalty: for God
Is Exalted in Power, Wise. (4:56)

II Unless he repents, believes,
And works righteous deeds,
For God will change
The evil of such persons (ibdl)
Into good, and God is
Oft-Forgiving, Most Merciful, (25:70)

This view naturally finds approval in the precepts and practices of the Apostle and his Companions. The Grand Qur'ān contains a general commandment for the imposition of prescribed punishments in case of certain specified offences against the person and property. However, the Apostle, by way of explanation, laid down certain exceptions to it e.g., hands are not to be chopped off by way of punishment in the enemy

territory and hands should not be cut off by way of penalty during travels.[42]

Likewise the Apostle declared that:

i) A male may see a prospective bride as it ensures chances of love and affection between the spouses;

ii) A person who was not the real culprit was apprehended in a case of rape and was convicted. Before the execution of the sentence the real culprit on his own accepted his crime and thus testified to the innocence of the convict. The Apostle of Allah who had himself decided the case, granted pardon to both, the former because and his innocence and the latter for his sense of right of justice.

Hazrat 'Umar pleaded that the real culprit should be punished because pardon will encourage the criminals and also constitutes an infringement of a divine command. The Apostle of Allah declared:

'The reason is that he has turned back to Allah.'

The Companions[43] followed suit and applied the same principle in exceptional circumstances. Some of the examples are:

1. Hazrat Abu Bakr burnt alive homosexuals by way of punishment and punished the apostates in the same manner. The general principle derived from the Hadith is:

   Punishment by fire shall not be imposed by anyone as it exclusively belongs to Allah. Punishment in the nature of a divine penalty is not to be imposed by men.

2. Hazrat 'Umar also laid down various exceptions to the prescribed penalties and other normative principles of law.

(a) He stopped the payments out of the funds collected by way of welfare tax for winning over non-Muslims for a certain period of time, though it is permitted by the Grand Qur'ān wherein no exception is mentioned about such temporary suspensions:

(b) Marriage with the women of the People of the Book was prohibited for the time being as the rule worked to the disadvantage of the believing women in the circumstances existing in the Muslim society at that time; and

(c) The prescribed penalty for stealing was not imposed by him during the period of famine. Keeping the interests of politico-religious expediency in view, he restricted or suspended the application of a number of textual rules of conduct, during the period he occupied the office of the Head of the State.

3. Hazrat 'Uthman[44] permitted the rounding up of stray camels and sale thereof, after the expiry of a certain waiting period inspite of the fact that such permission was denied by the Apostle of Allah during his life time. With the passage of time conditions in the society had changed and a general moral degradation had set in. In view of these circumstances policy demanded a change in the legal rules which was effected accordingly. Zuhry has stated:

'The reason was that when Hazrat 'Uthman realised that immorality and dishonesty had made deep inroads into the value judgments and the character of the people, who no more feel any fear and freely indulge in prohibited acts, he decided that the compulsions of policy or expediency required a change in the pre-existing law and adopted the aforesaid rule which excluded the possibility to a certain extent of a thief or miser rounding up camels for unlawful personal profit.'

4. Hazrat 'Ali ordered death by fire for Ghaly Shias, who maintained that he was none else than God. When this severe order was passed against them, they declared that they were now all the more convinced of the truth of their belief as the prerogative of punishment by fire exclusively belonged to Allah.[45]

Some other examples of such modification, qualification, exemptions and suspension of textual rules may be noted which all demonstrate that policy considerations demanded and received due consideration and accommodation at the hands of the obedients (Tab'īn) and Jurists (Fuqha').

1. Where it may not be possible to establish testimony by witnesses of unimpeachable character conforming to the Qur-ānic standard, the testimony of the best out of the available witnesses, has been declared to be admissible and reliable:[46]

Ibn Furhun maintains, that when general degeneration of morals and character of the people justifies the admissibility of testimony of a little less than unimpeachable character in the absence of an alternative, than, there is no reason to disapprove a change of policies to meet the needs arising out of the time changes and the affairs of men.

Allama Qaraphy [47] commenting on the said assertion observes;

'The undesirable has become desirable and that which was restricted has become spacious. The difference of times and circumstances has produced corresponding changes in the operative order.'

2. Orders for goods not in existence may be validly placed inspite of the fact that sale and purchase of future property is prohibited by a general rule of the Shai'ah, as the same has been permitted by the jurists.

3. Prior to the system of registration of documents relat-

ing to the sale of a property, delivery of possession was indispensible and till such delivery the property was presumed to be in possession and custody of the seller. After the coming into force of laws relating to registration of documents, the property sold is presumed to be in the possession of the purchaser at and after the registration of documents.[48]

4. Radio news possess highly probable probative value and the jurists could validly take decisions of news so received.

Ibn Qayim, is of the view that, the normative principle that new issues and problems should be effectively dealt with by changed operative orders, is a very significant rule of far reaching consequences and should be used very cautiously ensuring the preservation of textual legal principles.

He has observed at one place:

'This rule is of very wide application, the employment thereof requires deep thought and reflection, often even experts and sincere practitioners commit mistakes as this path is full of pitfalls. Non-employment thereof leads to the deprivation of right claims whereby limits are rendered ineffective and michief makers are encouraged. An ill use likewise opens the gates of injustice and oppression wide and provides an opportunity for violence and looting.'

At another place he says:

'It is a beneficial rule of great value. Ignorance thereof, has created grave misunderstanding about the Shari'ah. People are suffering from hardships and trouble. No way remains to know the path which leads to the high ideals and policies on which the Shari'ah is founded. Shari'ah is based on policy considerations of the human and spiritual life. Shari'ah is equity and mercy personified. It is entirely wisdom and expediency. Every rule which goes forth from equity to wrong, grace and mercy trouble and hardship, expedient to mischief and from wisdom

(policy) to futility, will not be a rule of the Shari'ah; although it might be admitted to it by argumentation.'

The above discussion clarifies that 'time changes and legal changes' could not be validly equated to the principle of 'Urf (custom) as some persons have assumed. In fact this principle is a part of independent policy which constitutes a definite source of Islamic law. Moreover, it may also be kept in mind that even in the case 'Urf or custom which is observed by the people, the underlying principle is policy considerations. Therefore, it, in most of the cases, relates to the principle of independent policy. The view point of Abdul Wahab Khallāf appears to be more correct.

Viewed realistically, custom is not an authoritative principle (argument) of the Shari'ah. Customs are often based on independent policy and are accommodated by suitable operative orders. It is also provided for in the interpretation of textual legal principles. It is also employed to qualify a general text. Sometimes analogy is displaced by custom.

All the leaders of interpreters have utilized custom to resolve various issues, the only difference is that some of them treated as normative principles while others considered it as merely a subsidiary rule. In case of a conflict between custom and interpretative rules not much difficulty is experienced. It cannot be relied upon in the face of a particular text. However, all the leading interpreters qualify general texts by custom, though some of them, as a matter of principle disagree with this proposition, as is clearly proved by some examples. Both Malikia" ahd Hanabila" permit employment of servants where food and clothing are provided by way of salary, inspite of the fact that this system is expressly founded on ignorance. Shawaf' and Ahnaph consider purchase and sale on instalment basis permissible. They also permit, transactions involving future property, purchasing goods on the basis of guarantee and the like.[49] Ahnaph and Malikia hold the view that sale of a fruit crop is valid at a time when the fruiting has started though it is incomplete.

It is quite evident that custom here means one which does not permit the prohibited or prohibits the permitted, and which does not contravene the general principles of the Shari'ah. A custom ('Urf) which displaces a mandatory or binding duty shall be certainly void.[50]

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